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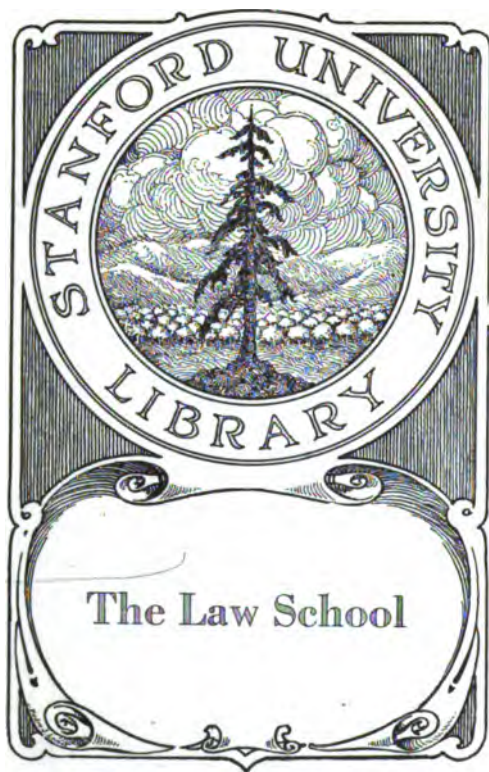
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Belknap, David Price

**BANCROFT'S**  
**CALIFORNIA LAWYER**  
**AND**  
**BOOK OF FORMS;**

CONTAINING

**INSTRUCTIONS FOR ORDINARY TRANSACTIONS**

IN MATTERS OF

DEEDS, MORTGAGES, ACKNOWLEDGMENTS, LEASES, ASSIGNMENTS, INSOLVENTS,  
ATTACHMENTS, BILLS OF EXCHANGE, PROMISSORY NOTES, BILLS OF SALE,  
EXECUTORS AND ADMINISTRATORS, HUSBAND AND WIFE, MARRIAGE AND  
DIVORCE, HOMESTEADS, GUARDIANS, APPRENTICES, BONDS, CHATTEL  
MORTGAGES, ARBITRATION, NATURALIZATION, PRE-EMPTION, AUCTIONEERS,  
CLERKS, NOTARIES, SHERIFFS, CORONERS, SCHOOLS,  
TAXES, LICENSES, PUBLIC OFFICERS, CONTRACTS, CORPORATIONS, JURORS,  
FOREIGNERS, INSANE PERSONS, ESTRAYS, WILLS, POWERS OF ATTORNEY,  
PARTNERSHIP, LANDLORD AND TENANT, MECHANICS' LIENS, JUSTICES' COURTS,  
MAGISTRATES, MINES, MINING AND WATER RIGHTS,  
ETC., ETC., ETC.

**WITH NUMEROUS PRECEDENTS AND FORMS;**

DESIGNED FOR THE USE OF

**BUSINESS AND PROFESSIONAL MEN, COUNTY AND TOWN OFFICERS,  
MINERS, MECHANICS AND FARMERS,**

AND ADAPTED, UNDER THE REVISED LAWS AND THE LATEST JUDICIAL DECISIONS, TO

**CALIFORNIA, OREGON AND WASHINGTON TERRITORY.**

**SAN FRANCISCO:**  
**H. H. BANCROFT & COMPANY,**  
**1860.**

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Entered according to Act of Congress, in the year of our Lord eighteen hundred and  
fifty-nine, by

H. H. BANCROFT & COMPANY,

In the Clerk's Office of the District Court of the Northern District of the State of  
California.

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## INTRODUCTION.

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IN view of the necessity of a book of forms for use in California, adapted to the peculiar features of our laws, and at the request of the publishers, the following work has been prepared, intended to serve for all the purposes usual in law and in works of this character.

The plan adopted embraces a wide range of subjects, each division containing not only a series of forms but also appropriate selections from the statutes, and the adjudications of the Supreme Court—in some instances separately arranged, in others connected and woven together—it being their design not only to furnish the necessary matters of law requisite in the preparation of forms, but also to present an outline of our legal system, so far as useful to citizens generally in their various business pursuits.

While, however, the object has been more particularly to prepare a compilation in popular form for the aid of laymen, it has also been arranged with reference to its use by conveyancers and the legal profession. The difficulty of combining satisfactorily these two objects, furnishes all the apology I might feel called upon to offer for the apparent want of uniformity in

the selection and arrangement of some portions of the matter introduced.

To extend the usefulness of the work, and adapt it generally to the Pacific coast, the laws of Oregon and Washington Territories are noted under the respective heads, so far as practicable, showing their resemblances and differences, as compared with our system.

The subject of mining rights, in view of its peculiar importance in this state, has been presented in a full and complete treatise; for which I am indebted to J. F. Bowman, Esq.

The excellent index to the constitution of this state was taken by permission of Dr. Wood from his compilation of the statutes, and the statutory references noted at the foot of each page as they occur, are made to the articulated enumeration in Wood's Digest, as the most simple and uniform method.

D. P. BELKNAP.

SAN FRANCISCO, 27th October, 1859.



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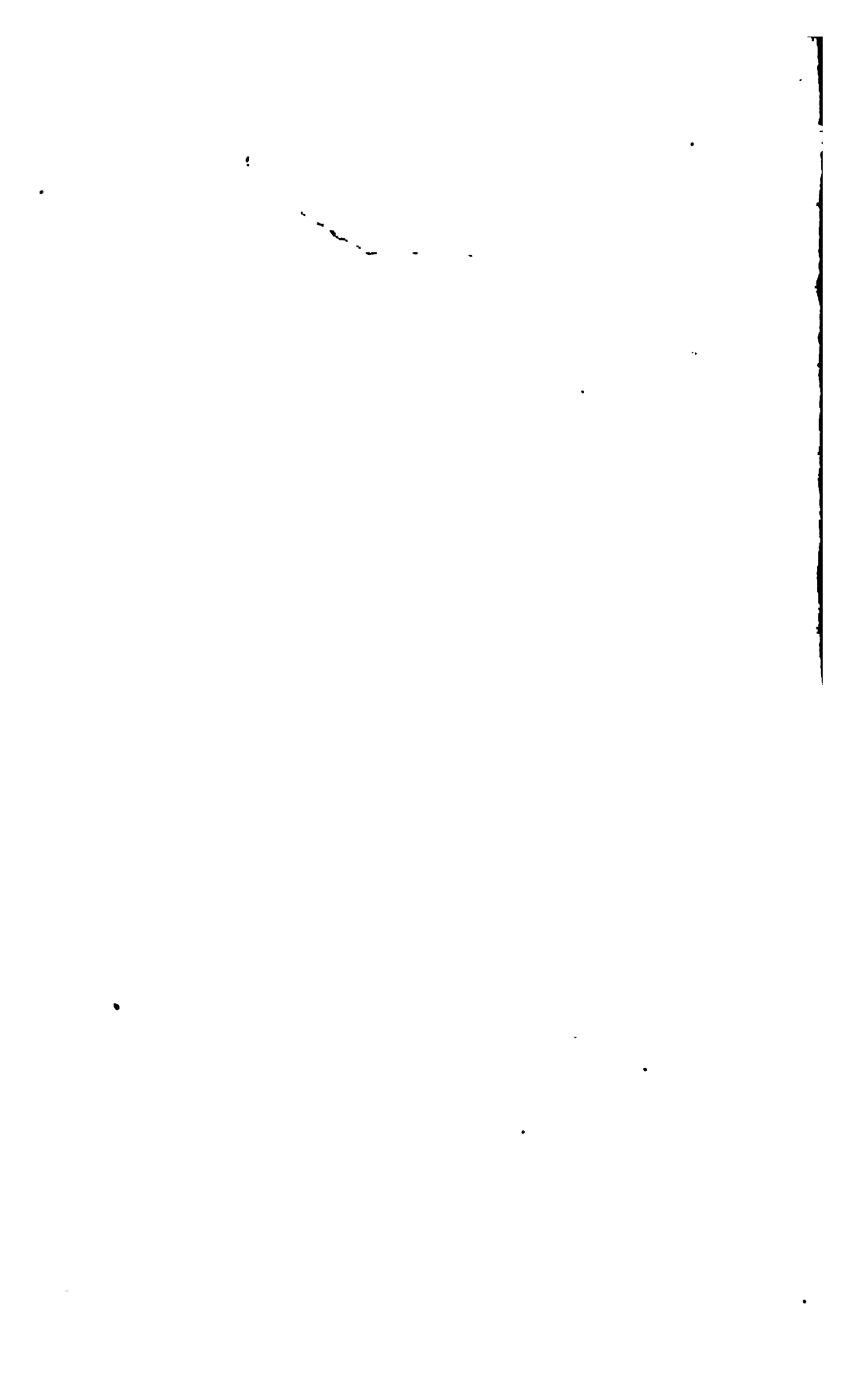
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THE  
CALIFORNIA LAWYER  
AND  
FORM BOOK.

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CHAPTER I.

THE CONSTITUTION OF CALIFORNIA, WITH DECISIONS OF THE SUPREME  
COURT UPON CONSTITUTIONAL CONSTRUCTION.

CONSTITUTION OF CALIFORNIA.

ADOPTED BY THE CONVENTION, OCTOBER 10, 1849; RATIFIED BY THE PEOPLE,  
NOVEMBER 13, 1849; PROCLAIMED, DECEMBER 20, 1849.

WE, the people of California, grateful to Almighty God for  
our freedom, in order to secure its blessings, do establish this  
Constitution.

ARTICLE I.

DECLARATION OF RIGHTS.

SECTION 1. All men are by nature free and independent, and  
have certain inalienable rights, among which are those of enjoy-  
ing and defending life and liberty; acquiring, possessing, and  
protecting property; and pursuing and obtaining safety and  
happiness.

SEC. 2. All political power is inherent in the people. Gov-  
ernment is instituted for the protection, security, and benefit of  
the people; and they have the right to alter or reform the same  
whenever the public good may require it.

SEC. 3. The right of trial by jury shall be secured to all, and

remain inviolate forever; but a jury trial may be waived by the parties, in all civil cases, in the manner to be prescribed by law.<sup>1</sup>

SEC. 4. The free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever be allowed in this state; and no person shall be rendered incompetent to be a witness on account of his opinions on matters of religious belief; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of this state.

SEC. 5. The privilege of the writ of *habeas corpus* shall not be suspended, unless when, in cases of rebellion or invasion, the public safety may require its suspension.

SEC. 6. Excessive bail shall not be required, nor excessive fines imposed, nor shall cruel or unusual punishments be inflicted, nor shall witnesses be unreasonably detained.

SEC. 7. All persons shall be bailable by sufficient sureties; unless for capital offences, when the proof is evident or the presumption great.

SEC. 8. No person shall be held to answer for a capital or otherwise infamous crime (except in cases of impeachment, and in cases of militia when in actual service, and the land and naval forces in time of war, or which this state may keep, with the consent of Congress, in time of peace, and in cases of petit larceny under the regulation of the legislature), unless on presentment or indictment of a grand jury; and in any trial in any court whatever, the party accused shall be allowed to appear and defend in person and with counsel, as in civil actions. No person shall be subject to be twice put in jeopardy for the same offence;<sup>2</sup> nor shall he be compelled, in any criminal case, to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.<sup>3</sup>

SEC. 9. Every citizen may freely speak, write, and publish

<sup>1</sup> The legislature cannot delegate the power of waiving jury trial to the courts. *Exline v. Smith*, 5 Cal. 112.

<sup>2</sup> Where defendant was convicted of manslaughter under an indictment for murder, and verdict set aside, he may be again tried under the same indictment. *People v. Gilmore*, 4 Cal. 376; *People v. March*, Oct. 1, 1856.

<sup>3</sup> The compensation must be made before the citizen can be divested of his rights. *San Francisco v. Scott*, 4 Cal. 111; *McCann v. Sierra county*, Jan. T., 1857.

his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press. In all criminal prosecutions on indictments for libels, the truth may be given in evidence to the jury; and if it shall appear to the jury that the matter charged as libellous is true, and was published with good motives and for justifiable ends, the party shall be acquitted; and the jury shall have the right to determine the law and the fact.

SEC. 10. The people shall have the right freely to assemble together to consult for the common good, to instruct their representatives, and to petition the legislature for redress of grievances.

SEC. 11. All laws of a general nature shall have a uniform operation.<sup>1</sup>

SEC. 12. The military shall be subordinate to the civil power. No standing army shall be kept up by this state in time of peace; and in time of war no appropriation for a standing army shall be for a longer time than two years.

SEC. 13. No soldier shall, in time of peace, be quartered in any house, without the consent of the owner; nor in time of war, except in the manner to be prescribed by law.

SEC. 14. Representation shall be apportioned according to population.

SEC. 15. No person shall be imprisoned for debt in any civil action, on *mesne* or final process, unless in cases of fraud; and no person shall be imprisoned for a militia fine in time of peace.

SEC. 16. No bill of attainder, *ex post facto* law, or law impairing the obligation of contracts, shall ever be passed.

SEC. 17. Foreigners who are, or who may hereafter become, *bona fide* residents of this state, shall enjoy the same rights, in respect to the possession, enjoyment, and inheritance of property, as native-born citizens.<sup>2</sup>

SEC. 18. Neither slavery nor involuntary servitude, unless for the punishment of crimes, shall ever be tolerated in this state.

SEC. 19. The right of the people to be secure in their per-

<sup>1</sup> Should, as near as possible, affect persons and property alike. *People v. Coleman*, 4 Cal. 46.

<sup>2</sup> The foreign miners law is not repugnant to this section. *People v. Naglee*, 1 Cal. 232. A non-resident alien cannot maintain ejectment. *Siemssen v. Bofer*, July T. 1856.

books, houses, papers, and effects, against unreasonable seizures and searches, shall not be violated; and no warrant shall issue but on probable cause, supported by oath or affirmation, particularly describing the place to be searched and the persons and things to be seized.

Sec. 20. Treason against the state shall consist only in levying war against it, adhering to its enemies, or giving them aid and comfort. No person shall be convicted of treason, unless on the evidence of two witnesses to the same overt act, or confession in open court.

Sec. 21. This enumeration of rights shall not be construed to impair or deny others retained by the people.

## ARTICLE II.

### RIGHT OF SUFFRAGE.

Section 1. Every white male citizen of the United States, and every white male citizen of Mexico, who shall have elected to become a citizen of the United States, under the treaty of peace exchanged and ratified at Querétaro, on the 30th day of May, 1848, of the age of twenty-one years, who shall have been a resident of the state six months next preceding the election, and the county or district in which he claims his vote thirty days, shall be entitled to vote at all elections which are now or hereafter may be authorized by law; *provided*, that nothing herein contained shall be construed to prevent the legislature by a two-thirds concurrent vote, from admitting to the right of suffrage Indians, or the descendants of Indians, in such special cases as such a proportion of the legislative body may deem just and proper.

Sec. 2. Electors shall, in all cases except treason, felony or breach of the peace, be privileged from arrest on the days of election, during their attendance at such election, going to and returning therefrom.

Sec. 3. No elector shall be obliged to perform militia duty on the day of election, except in time of war or public danger.

Sec. 4. For the purpose of voting, no person shall be deemed to have gained or lost a residence by reason of his presence or absence while employed in the service of the United States, nor



while engaged in the navigation of the waters of this state or of the United States, or of the high seas; nor while a student of any seminary of learning; nor while kept at any almshouse or other asylum at public expense; nor while confined in any public prison.

SEC. 5. No idiot or insane person, or person convicted of any infamous crime, shall be entitled to the privileges of an elector.

SEC. 6. All elections by the people shall be by ballot.

### ARTICLE III.

#### DISTRIBUTION OF POWERS.

SECTION 1. The powers of the government of the state of California shall be divided into three separate departments: the legislative, the executive, and judicial; and no person charged with the exercise of powers properly belonging to one of these departments shall exercise any functions appertaining to either of the others, except in the cases hereinafter expressly directed or permitted.

### ARTICLE IV.

#### LEGISLATIVE DEPARTMENT.

SECTION 1. The legislative power of this state shall be vested in a senate and assembly, which shall be designated the legislature of the state of California, and the enacting clause of every law shall be as follows: "The people of the state of California, represented in senate and assembly, do enact as follows:"

SEC. 2. The sessions of the legislature shall be annual, and shall commence on the first Monday of January next ensuing the election of its members, unless the governor of the state shall, in the interim, convene the legislature by proclamation.

SEC. 3. The members of the assembly shall be chosen annually by the qualified electors of their respective districts, on the Tuesday next after the first Monday in November, unless otherwise ordered by the legislature, and their term of office shall be one year.

SEC. 4. Senators and members of assembly shall be duly

qualified electors in ~~the~~ respective counties and districts which they represent.

SEC. 5. Senators shall be chosen for the term of two years, at the same time and places as members of assembly, and no person shall be a member of the senate or assembly who has not been a citizen and inhabitant of the state for one year, and of the county or district for which he shall be chosen six months next before his election.

SEC. 6. The number of senators shall not be less than one-third, nor more than one-half of that of the members of assembly; and at the first session of the legislature after this constitution takes effect the senators shall be divided by lot, as equally as may be, into two classes: the seats of the senators of the first class shall be vacated at the expiration of the first year, so that one-half shall be chosen annually.

SEC. 7. When the number of senators is increased, they shall be apportioned by lot, so as to keep the two classes as nearly equal in number as possible.

SEC. 8. Each house shall choose its own officers, and judge of the qualifications, elections, and returns of its own members.

SEC. 9. A majority of each house shall constitute a quorum to do business; but a smaller number may adjourn from day to day, and may compel the attendance of absent members, in such manner, and under such penalties as each house may provide.

SEC. 10. Each house shall determine the rules of its own proceedings, and may, with the concurrence of two-thirds of all the members elected, expel a member.

SEC. 11. Each house shall keep a journal of its own proceedings, and publish the same; and the yeas and nays of the members of either house on any question shall, at the desire of any three members present, be entered on the journal.

SEC. 12. Members of the legislature shall, in all cases except treason, felony, and breach of the peace, be privileged from arrest, and shall not be subject to any civil process during the session of the legislature, nor for fifteen days next before the commencement and after the termination of each session.

SEC. 13. When vacancies occur in either house, the governor, or the person exercising the functions of the governor, shall issue writs of election to fill such vacancies,

SEC. 14. The doors of each house shall be open, except on such occasions as, in the opinion of the house, may require secrecy.

SEC. 15. Neither house shall, without the consent of the other, adjourn for more than three days, nor to any other place than that in which they may be sitting.

SEC. 16. Any bill may originate in either house of the legislature, and all bills passed by one house may be amended in the other.

SEC. 17. Every bill which may have passed the legislature shall, before it becomes a law, be presented to the governor. If he approve it he shall sign it, but if not, he shall return it, with his objections, to the house in which it originated, which shall enter the same upon the journal, and proceed to reconsider it. If, after such reconsideration, it again pass both houses, by yeas and nays, by a majority of two-thirds of the members of each house present, it shall become a law, notwithstanding the governor's objections. If any bill shall not be returned within ten days after it shall have been presented to him (Sundays excepted), the same shall be a law, in like manner as if he had signed it, unless the legislature, by adjournment, prevent such return.<sup>1</sup>

SEC. 18. The assembly shall have the sole power of impeachment, and all impeachments shall be tried by the senate. When sitting for that purpose, the senators shall be upon oath or affirmation; and no person shall be convicted without the concurrence of two-thirds of the members present.

SEC. 19. The governor, lieutenant-governor, secretary of state, controller, treasurer, attorney-general, surveyor-general, justices of the supreme court and judges of the district courts, shall be liable to impeachment for any misdemeanor in office; but judgment in such cases shall extend only to removal from office and disqualification to hold any office of honor, trust, or profit under the state; but the party convicted or acquitted shall, nevertheless, be liable to indictment, trial, and punishment, according to law. All other civil officers shall be tried,

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<sup>1</sup> The term "Sundays excepted" applies only to the *last day* of the ten which the executive has for consideration of a bill. *People ex rel. Hepburn v. Whitman*, Oct. T. 1858.

for misdemeanors in office, in such a manner as the legislature may provide.

SEC. 20. No senator or member of assembly shall, during the term for which he shall have been elected, be appointed to any civil office of profit, under this state, which shall have been created, or the emoluments of which shall have been increased during such term, except such offices as may be filled by elections by the people.

SEC. 21. No person holding any lucrative office under the United States, or any other power, shall be eligible to any civil office of profit under this state; *provided*, that officers in the militia, to which there is attached no annual salary, or local officers and postmasters, whose compensation does not exceed five hundred dollars per annum, shall not be deemed lucrative.

SEC. 22. No person who shall be convicted of the embezzlement or defalcation of the public funds of this state shall ever be eligible to any office of honor, trust or profit, under this state; and the legislature shall, as soon as practicable, pass a law providing for the punishment of such embezzlement or defalcation as a felony.

SEC. 23. No money shall be drawn from the treasury but in consequence of appropriations made by law. An accurate statement of the receipts and expenditures of the public moneys shall be attached to, and published with, the laws at every regular session of the legislature.

SEC. 24. The members of the legislature shall receive for their services a compensation to be fixed by law, and paid out of the public treasury; but no increase of the compensation shall take effect during the term for which the members of either house shall have been elected.

SEC. 25. Every law enacted by the legislature shall embrace but one object, and that shall be expressed in the title; and no law shall be revised or amended by reference to its title; but in such case the act revised, or section amended, shall be re-enacted and published at length.<sup>1</sup>

SEC. 26. No divorce shall be granted by the legislature.

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<sup>1</sup> A law is constitutional, in view of this section, where the subjects embraced in the statute, and not expressed in the title, have congruity or proper connection. *Dewitt v. San Francisco*, 2 Cal. 399. This section is merely directory. *Washington v. Page*, 4 Cal. 333.

SEC. 27. No lottery shall be authorized by this state, nor shall the sale of lottery tickets be allowed.

SEC. 28. The enumeration of the inhabitants of this state shall be taken, under the direction of the legislature, in the year one thousand eight hundred and fifty-two, and one thousand eight hundred and fifty-five, and at the end of every ten years thereafter; and these enumerations, together with the census that may be taken, under the direction of the congress of the United States, in the year one thousand eight hundred and fifty, and every subsequent ten years, shall serve as the basis of representation in both houses of the legislature.

SEC. 29. The number of senators and members of assembly shall, at the first session of the legislature holden after the enumerations herein provided for are made, be fixed by the legislature, and apportioned among the several counties and districts to be established by law, according to the number of white inhabitants. The number of members of assembly shall not be less than twenty-four, nor more than thirty-six, until the number of inhabitants within this state shall amount to one hundred thousand; and, after that period, at such ratio that the whole number of members of assembly shall never be less than thirty, nor more than eighty.

SEC. 30. When a congressional, senatorial or assembly district, shall be composed of two or more counties, it shall not be separated by any county belonging to another district; and no county shall be divided in forming a congressional, senatorial or assembly district.

SEC. 31. Corporations may be formed under general laws, but shall not be created by special act, except for municipal purposes.<sup>1</sup> All general laws and special acts passed pursuant to this section may be altered from time to time, or repealed.

SEC. 32. Dues from corporations shall be secured by such individual liability of the corporators, and other means, as may be prescribed by law.

SEC. 33. The term corporations, as used in this article, shall be construed to include all associations and joint-stock compa-

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<sup>1</sup> The term "municipal" is limited to governmental, and cannot be extended to commercial purposes. *Lowe v. Marysville*, 5 Cal. 214.

nies having any of the powers ~~or~~ <sup>privileges</sup> of corporations not possessed by individuals or partnerships. And all corporations shall have the right to sue, and shall be subject to be sued, in all courts, in like cases as natural persons.

Sec. 34. The legislature shall have no power to pass any act granting any charter for banking purposes; but associations may be formed, under general laws, for the deposit of gold and silver; but no such association shall make, issue or put in circulation any bill, check, ticket, certificate, promissory note, or other paper, or the paper of any bank, to circulate as money.

Sec. 25. The legislature of this state shall prohibit by law any person or persons, association, company or corporation, from exercising the privileges of banking, or creating paper to circulate as money.

Sec. 26. Each stockholder of a corporation or joint-stock association shall be individually and personally liable for his proportion of all its debts and liabilities.

Sec. 27. It shall be the duty of the legislature to provide for the organization of cities and incorporated villages, and to restrict their power of taxation, assessment, borrowing money, contracting debts and loaning their credit, so as to prevent abuses in assessments and in contracting debts by such municipal corporations.

Sec. 28. In all elections by the legislature the members thereof shall vote *viva voce*, and the votes shall be entered on the journal.

## ARTICLE V.

### EXECUTIVE DEPARTMENT.

Section 1. The supreme executive power of this state shall be vested in a chief magistrate, who shall be styled the governor of the state of California.

Sec. 2. The governor shall be elected by the qualified electors, at the time and places of voting for members of assembly, and shall hold his office two years from the time of his installation, and until his successor shall be qualified.

Sec. 3. No person shall be eligible to the office of governor (except at the first election) who has not been a citizen of the

United States and a resident of this state two years next preceding the election, and attained the age of twenty-five years, at the time of said election.

SEC. 4. The returns of every election for governor shall be sealed up and transmitted to the seat of government, directed to the speaker of the assembly, who shall, during the first week of the session, open and publish them in presence of both houses of the legislature. The person having the highest number of votes shall be governor; but, in case any two or more have an equal and the highest number of votes, the legislature shall, by joint vote of both houses, choose one of said persons so having an equal and the highest number of votes for governor.

SEC. 5. The governor shall be commander-in-chief of the militia, the army and navy of this state.

SEC. 6. He shall transact all executive business with the officers of government, civil and military, and may require information in writing from the officers of the executive department, upon any subject relating to the duties of their respective offices.

SEC. 7. He shall see that the laws are faithfully executed.

SEC. 8. When any office shall, from any cause, become vacant, and no mode is provided by the constitution and laws for filling such vacancy, the governor shall have power to fill such vacancy by granting a commission, which shall expire at the end of the next session of the legislature, or at the next election by the people.

SEC. 9. He may, on extraordinary occasions, convene the legislature by proclamation, and shall state to both houses, when assembled, the purpose for which they shall have been convened.

SEC. 10. He shall communicate by message to the legislature, at every session, the condition of the state, and recommend such matters as he shall deem expedient.

SEC. 11. In case of a disagreement between the two houses with respect to the time of adjournment, the governor shall have power to adjourn the legislature to such time as he may think proper; *provided*, it be not beyond the time fixed for the meeting of the next legislature.

SEC. 12. No person shall, while holding any office under the United States or this state, exercise the office of governor, except as hereinafter expressly provided.

SEC. 13. The governor shall have the power to grant reprieves and pardons after conviction, for all offences except treason and cases of impeachment, upon such conditions and with such restrictions and limitations as he may think proper, subject to such regulations as may be provided by law relative to the manner of applying for pardons. Upon conviction for treason, he shall have the power to suspend the execution of the sentence until the case shall be reported to the legislature at its next meeting, when the legislature shall either pardon, direct the execution of the sentence, or grant a further reprieve. He shall communicate to the legislature, at the beginning of every session, every case of reprieve or pardon granted, stating the name of the convict, the crime of which he was convicted, the sentence and its date, and the date of the pardon or reprieve.

SEC. 14. There shall be a seal of this state, which shall be kept by the governor, and used by him officially, and shall be called "the great seal of the state of California."

SEC. 15. All grants and commissions shall be in the name and by the authority of the people of the state of California, sealed with the great seal of the state, signed by the governor, and countersigned by the secretary of state.

SEC. 16. A lieutenant-governor shall be elected at the same time and places, and in the same manner as the governor; and his term of office, and his qualifications of eligibility, shall also be the same. He shall be president of the senate, but shall only have a casting vote therein. If, during a vacancy of the office of governor, the lieutenant-governor shall be impeached, displaced, resign, die, or become incapable of performing the duties of his office, or be absent from the state, the president of the senate shall act as governor, until the vacancy be filled, or the disability shall cease.

SEC. 17. In case of the impeachment of the governor, or his removal from office, death, inability to discharge the powers and duties of the said office, resignation, or absence from the state, the powers and duties of the office shall devolve upon the lieutenant-governor for the residue of the term, or until the disability shall cease. But when the governor shall, with the consent of the legislature, be out of the state in time of war, at



the head of any military force thereof, he shall continue commander-in-chief of all the military force of the state.

SEC. 18. A secretary of state, a controller, a treasurer, an attorney-general, and surveyor-general, shall be chosen in the manner provided in this constitution; and the term of office, and eligibility of each, shall be the same as are prescribed for the governor and lieutenant-governor.

SEC. 19. The secretary of state shall be appointed by the governor, by and with the advice and consent of the senate. He shall keep a fair record of the official acts of the legislative and executive departments of the government, and shall, when required, lay the same, and all matters relative thereto, before either branch of the legislature; and shall perform such other duties as shall be assigned him by law.

SEC. 20. The controller, treasurer, attorney-general, and surveyor-general, shall be chosen by joint vote of the two houses of the legislature, at their first session under this constitution, and thereafter shall be elected at the same time and places, and in the same manner as the governor and lieutenant-governor.

SEC. 21. The governor, lieutenant-governor, secretary of state, controller, treasurer, attorney-general, and surveyor-general, shall each, at stated times during their continuance in office, receive for their services a compensation, which shall not be increased or diminished during the term for which they shall have been elected; but neither of these officers shall receive for his own use any fees for the performance of his official duties.

## ARTICLE VI.

### JUDICIAL DEPARTMENT.

SECTION. 1. The judicial power of this state shall be vested in a supreme court, in district courts, in county courts, and in justices of the peace. The legislature may also establish such municipal and other inferior courts as may be deemed necessary.

SEC. 2. The supreme court shall consist of a chief justice and two associate justices, any two of whom shall constitute a quorum.

SEC. 3. The justices of the supreme court shall be elected at the general election by the qualified electors of the state, and

shall hold their office for the term of six years from the first day of January next after their election: provided that the legislature shall, at its first meeting, elect a chief justice and two associate justices of the supreme court, by joint vote of both houses, and so classify them that one shall go out of office every two years. After the first election, the senior justice in commission shall be the chief justice.

**Sec. 5.** The supreme court shall have appellate jurisdiction in all cases when the matter in dispute exceeds two hundred dollars, when the legality of any tax, toll, or impost or municipal fine is in question, and in all criminal cases amounting to felony or questions of law alone. And the said court, and each of the justices thereof, as well as all district and county judges, shall have power to issue writs of *habeas corpus* at the instance of any person held in actual custody. They shall also have power to issue all other writs and process necessary to the exercise of their appellate jurisdiction, and shall be conservators of the peace throughout the state.

**Sec. 6.** The state shall be divided by the first legislature into a convenient number of districts, subject to such alteration from time to time as the public good may require, for each of which a district judge shall be appointed by the joint vote of the legislature, at its first meeting, who shall hold his office for two years from the first day of January next after his election; after which, said judges shall be elected by the qualified electors of their respective districts, at the general election, and shall hold their office for the term of six years.

**Sec. 6.** The district courts shall have original jurisdiction, in law and equity, in all civil cases where the amount in dispute exceeds two hundred dollars, exclusive of interest. In all criminal cases not otherwise provided for, and in all issues of fact joined in the probate courts, their jurisdiction shall be unlimited.\*

**Sec. 7.** The legislature shall provide for the election, by the people, of a clerk of the supreme court, and county clerks, district attorneys, sheriffs, coroners, and other necessary officers;

\* The jurisdiction is limited to felony. *People v. Applegate*, 5 Cal. 295.

\* The word "unlimited" qualifies the amount in value and not the term "original." *Reed v. Metherick*, 4 Cal. 849. "Issues of fact," etc., refer to issues to be tried. Id.

and shall fix by law their duties and compensation. County clerks shall be, *ex officio*, clerks of the district courts in and for their respective counties.

SEC. 8. There shall be elected in each of the organized counties of this state, one county judge, who shall hold his office for four years. He shall hold the county court, and perform the duties of surrogate or probate judge. The county judge, with two justices of the peace, to be designated according to law, shall hold courts of sessions with such criminal jurisdiction as the legislature shall prescribe, and he shall perform such other duties as shall be required by law.<sup>1</sup>

SEC. 9. The county courts shall have such jurisdiction, in cases arising in justices' courts, and in special cases, as the legislature may prescribe, but shall have no original civil jurisdiction, except in such special cases.<sup>2</sup>

SEC. 10. The times and places of holding the terms of the supreme court, and the general and special terms of the district courts within the several districts, shall be provided for by law.

SEC. 11. No judicial officer, except a justice of the peace, shall receive, to his own use, any fees or perquisites of office.

SEC. 12. The legislature shall provide for the speedy publication of all statute laws, and of such judicial decisions as it may deem expedient; and all laws and judicial decisions shall be free for publication by any person.

SEC. 13. Tribunals for conciliation may be established, with such powers and duties as may be prescribed by law; but such tribunals shall have no power to render judgment to be obligatory on the parties, except they voluntarily submit their matters in difference, and agree to abide the judgment, or assent thereto in the presence of such tribunal, in such cases as shall be prescribed by law.

SEC. 14. The legislature shall determine the number of justices of the peace, to be elected in each county, city, town and incorporated village of the state, and fix by law their powers, duties and responsibilities. It shall also determine in what cases appeals may be made from justices' courts to the county court.

<sup>1</sup> The county judge and two associates are necessary to constitute the court. *People v. Ah Chang*, 5 Cal. 108.

<sup>2</sup> *Parsons v. Tuolumne county*, 5 Cal. 48; *Brook v. Bruce*, id. 279.

SEC. 15. The justices of the supreme court, and judges of the district courts, shall severally, at stated times during their continuation in office, receive for their services a compensation to be paid out of the treasury, which shall not be increased or diminished during the term for which they shall have been elected. The county judges shall also severally, at stated times, receive for their services a compensation to be paid out of the county treasury of their respective counties, which shall not be increased or diminished during the term for which they shall have been elected.

SEC. 16. The justices of the supreme court and district judges shall be ineligible to any other office during the term for which they shall have been elected.

SEC. 17. Judges shall not charge juries with respect to matters of fact, but may state the testimony and declare the law.

SEC. 18. The style of all process shall be "The people of the state of California;" and all prosecutions shall be conducted in the name and by the authority of the same.

## ARTICLE VII.

### MILITIA.

SECTION 1. The legislature shall provide by law for organizing and disciplining the militia, in such manner as they shall deem expedient, not incompatible with the constitution and laws of the United States.

SEC. 2. Officers of the militia shall be elected or appointed, in such manner as the legislature shall from time to time direct, and shall be commissioned by the governor.

SEC. 3. The governor shall have power to call forth the militia, to execute the laws of the state, to suppress insurrections and repel invasions.

## ARTICLE VIII.

### STATE DEBTS.

The legislature shall not in any manner create any debt or debts, liability or liabilities, which shall singly, or in the aggre-

gate, with any previous debts or liabilities, exceed the sum of three hundred thousand dollars, except in case of war, to repel invasion or suppress insurrection, unless the same shall be authorized by some law for some single object or work, to be distinctly specified therein, which law shall provide ways and means, exclusive of loans, for the payment of the interest of such debt or liability, as it falls due, and also to pay and discharge the principal of such debt or liability within twenty years from the time of the contracting thereof, and shall be irrepealable until the principal and interest thereon shall be paid and discharged; but no such law shall take effect until, at a general election, it shall have been submitted to the people, and have received a majority of all the votes cast for and against it at such election; and all money raised by authority of such law, shall be applied only to the specific object therein stated, or to the payment of the debt thereby created; and such law shall be published in at least one newspaper in each judicial district, if one be published therein, throughout the state, for three months next preceding the election at which it is submitted to the people.<sup>1</sup>

## ARTICLE IX.

### EDUCATION.

SECTION 1. The legislature shall provide for the election, by the people, of a superintendent of public instruction, who shall hold his office for three years, and whose duties shall be prescribed by law, and who shall receive such compensation as the legislature may direct.

SEC. 2. The legislature shall encourage, by all suitable means, the promotion of intellectual, scientific, moral and agricultural improvement. The proceeds of all lands that may be granted by the United States to this state for the support of schools, which may be sold or disposed of, and the five hundred thousand acres of land granted to the new states, under an act of congress distributing the proceeds of the public lands among the several

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<sup>1</sup> The entire state debt over three hundred thousand dollars, declared unconstitutional. *People v. Johnson*, Oct. T. 1856. *Nongues v. Douglass*, Jan. T. 1857.

states of the Union, approved A. D. one thousand eight hundred and forty-one; and all estates of deceased persons who may have died without leaving a will, or heir, and also such per cent. as may be granted by congress on the sale of lands in this state, shall be and remain a perpetual fund, the interest of which, together with all the rents of the unsold lands, and such other means as the legislature may provide, shall be inviolably appropriated to the support of common schools throughout the state.

SEC. 3. The legislature shall provide for a system of common schools, by which a school shall be kept up and supported in each district at least three months in every year, and any school district neglecting to keep up and support such a school may be deprived of its proportion of the interest of the public fund during such neglect.

SEC. 4. The legislature shall take measures for the protection, improvement, or other disposition of such lands as have been, or may hereafter be reserved or granted by the United States, or any person or persons, to this state for the use of a university; and the funds accruing from the rents or sale of such lands, or from any other source for the purpose aforesaid, shall be and remain a permanent fund, the interest of which shall be applied to the support of said university, with such branches as the public convenience may demand, for the promotion of literature, the arts and sciences, as may be authorized by the terms of such grant. And it shall be the duty of the legislature, as soon as may be, to provide effectual means for the improvement and permanent security of the funds of said university.

## ARTICLE X.

### MODE OF AMENDING AND REVISING THE CONSTITUTION.

SECTION 1. Any amendment or amendments to this constitution, may be proposed in the senate or assembly; and if the same shall be agreed to by a majority of the members elected to each of the two houses, such proposed amendment or amendments shall be entered on their journals, with the yeas and nays taken thereon, and referred to the legislature then next to be chosen, and shall be published for three months next preceding

the time of making such choice. And if, in the legislature next chosen as aforesaid, such proposed amendment or amendments shall be agreed to by a majority of all the members elected to each house, then it shall be the duty of the legislature to submit such proposed amendment or amendments to the people, in such manner and at such time as the legislature shall prescribe; and if the people shall approve and ratify such amendment or amendments, by a majority of the electors qualified to vote for members of the legislature voting thereon, such amendment or amendments shall become part of the constitution.

SEC. 2. And if, at any time, two-thirds of the senate and assembly shall think it necessary to revise or change this entire constitution, they shall recommend to the electors, at the next election for members of the legislature, to vote for or against a convention, and if it shall appear that a majority of the electors, voting at such election, have voted in favor of calling a convention, the legislature shall, at its next session, provide, by law, for calling a convention, to be holden within six months after the passage of such law; and such convention shall consist of a number of members, not less than that of both branches of the legislature. The constitution that may have been agreed upon and adopted by such convention, shall be submitted to the people, at a special election, to be provided for by law, for their ratification or rejection; each voter shall express his opinion by depositing in the ballot-box a ticket, whereon shall be written or printed, the words "for the new constitution," or "against the new constitution." The returns of such election shall, in such manner as the convention shall direct, be certified to the executive of the state, who shall call to his assistance the controller, treasurer and secretary of state, and compare the votes so certified to him. If, by such examination, it be ascertained that a majority of the whole number of votes cast at such election, be in favor of such new constitution, the executive of this state shall, by his proclamation, declare such new constitution to be the constitution of the state of California.—[Am. Nov. 4, 1856.]

## ARTICLE XI.

## MISCELLANEOUS PROVISIONS.

SECTION 1. The first session of the legislature shall be held at the Pueblo de San José; which place shall be the permanent seat of government, until removed by law; *provided, however*, that two-thirds of all the members elected to each house of the legislature shall concur in the passage of such law.<sup>1</sup>

SEC. 2. Any citizen of this state who shall, after the adoption of this constitution, fight a duel with deadly weapons, or send or accept a challenge to fight a duel with deadly weapons, either within this state or out of it; or who shall act as second, or knowingly aid or assist in any manner those thus offending, shall not be allowed to hold any office of profit or to enjoy the right of suffrage under this constitution.

SEC. 3. Members of the legislature, and all officers, executive and judicial, except such inferior officers as may be by law exempted, shall, before they enter on the duties of their respective offices, take and subscribe the following oath or affirmation:

"I do solemnly swear (or affirm, as the case may be) that I will support the constitution of the United States, and the constitution of the state of California, and that I will faithfully discharge the duties of the office of ———, according to the best of my ability."

And no other oath, declaration, or test, shall be required as a qualification for any office or public trust.

SEC. 4. The legislature shall establish a system of county and town governments, which shall be as nearly uniform as practicable throughout the state.

SEC. 5. The legislature shall have power to provide for the election of a board of supervisors in each county; and these supervisors shall jointly and individually perform such duties as may be prescribed by law.

SEC. 6. All officers whose election or appointment is not pro-

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<sup>1</sup> This section places the location of the capital in the discretion of the legislature, and it is not subject to the control of the judiciary. *People v. Bigler*, 5 Cal. 22.



vided for by this constitution, and all officers whose offices may be hereafter created by law, shall be elected by the people, or appointed as the legislature may direct.

SEC. 7. When the duration of any office is not provided for by this constitution, it may be declared by law, and if not so declared, such office shall be held during the pleasure of the authority making the appointment; nor shall the duration of any office, not fixed by this constitution, ever exceed four years.<sup>1</sup>

SEC. 8. The fiscal year shall commence on the first day of July.

SEC. 9. Each county, town, city and incorporated village, shall make provision for the support of its own officers, subject to such restrictions and regulations as the legislature may prescribe.

SEC. 10. The credit of the state shall not, in any manner, be given or loaned to or in aid of any individual, association, or corporation; nor shall the state directly or indirectly become a stockholder in any association or corporation.

SEC. 11. Suits may be brought against the state in such manner, and in such courts, as shall be directed by law.

SEC. 12. No contract of marriage, if otherwise duly made, shall be invalidated for want of conformity to the requirements of any religious sect.

SEC. 13. Taxation shall be equal and uniform throughout the state.<sup>2</sup> All property in this state shall be taxed in proportion to its value, to be ascertained as directed by law; but assessors and collectors of town, county and state taxes, shall be elected by the qualified electors of the district, county, or town, in which the property taxed for state, county, or town purposes is situated.<sup>3</sup>

SEC. 14. All property, both real and personal, of the wife, owned or claimed by her before marriage, and that acquired afterward by gift, devise, or descent, shall be her separate property; and laws shall be passed more clearly defining the rights of the wife, in relation as well to her separate property, as to that held in common with her husband. Laws shall also be

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<sup>1</sup> People ex rel. Finley v. Jewett, July T., 1856. People v. Reid, id.

<sup>2</sup> This section was adopted as a pledge of security to the native inhabitants. People v. Coleman, 4 Cal. 46. It applies only to direct taxation on property. People v. Naglee, 1 Cal. 233.

<sup>3</sup> That the same property is taxed in another state is no ground why it should not be taxed in Cal. fortis, when it is within the limits of the latter state. Minturn v. Hays, 2 Cal. 590.

passed providing for the registration of the wife's separate property.

SEC. 15. The legislature shall protect by law, from forced sale, a certain portion of the homestead and other property of all heads of families.<sup>1</sup>

SEC. 16. No perpetuities shall be allowed except for eleemosynary purposes.

SEC. 17. Every person shall be disqualified from holding any office of profit in this state, who shall have been convicted of having given or offered a bribe, to procure his election or appointment.

SEC. 18. Laws shall be made to exclude from office, serving on juries, and from the right of suffrage, those who shall hereafter be convicted of bribery, perjury, forgery, or other high crimes. The privilege of free suffrage shall be supported by laws regulating elections, and prohibiting under adequate penalties, all undue influence thereon from power, bribery, tumult, or other improper practice.

SEC. 19. Absence from this state on business of the state, or of the United States, shall not affect the question of residence of any person.

SEC. 20. A plurality of the votes given at any election shall constitute a choice, where not otherwise directed in this constitution.

SEC. 21. All laws, decrees, regulations and provisions, which from their nature require publication, shall be published in English and Spanish.

## ARTICLE XII.

### BOUNDARY.

The boundary of the state of California shall be as follows:—

Commencing at the point of intersection of forty-second degree of north latitude with the one hundred twentieth degree of longitude west from Greenwich, and running south on the line of said one hundred twentieth degree of west longitude until it intersects the thirty-ninth degree of north latitude; thence running in a

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<sup>1</sup> Cook v. McChristian, 4 Cal. 22.

straight line in a south-easterly direction to the river Colorado, at a point where it intersects the thirty-fifth degree of north latitude; thence down the middle of the channel of said river, to the boundary line between the United States and Mexico, as established by the treaty of May thirtieth, one thousand eight hundred and forty-eight; thence running west and along said boundary line to the Pacific Ocean, and extending therein three English miles; thence running in a north-westerly direction and following the direction of the Pacific Coast to the forty-second degree of north latitude, thence on the line of said forty-second degree of north latitude to the place of beginning. Also all the islands, harbors and bays, along and adjacent to the coast.

#### SCHEDULE.

SECTION 1. All rights, prosecutions, claims and contracts, as well of individuals as of bodies corporate, and all laws in force at the time of the adoption of this constitution, and not inconsistent therewith, until altered or repealed by the legislature, shall continue as if the same had not been adopted.

SEC. 2. The legislature shall provide for the removal of all causes which may be pending when this constitution goes into effect, to courts created by the same.

SEC. 3. In order that no inconvenience may result to the public service, from the taking effect of this constitution, no office shall be superseded thereby, nor the laws relative to the duties of the several officers be changed, until the entering into office of the new officers to be appointed under this constitution.

SEC. 4. The provisions of this constitution concerning the term of residence necessary to enable persons to hold certain offices therein mentioned, shall not be held to apply to officers chosen by the people at the first election, or by the legislature at its first session.

SEC. 5. Every citizen of California, declared a legal voter by this constitution, and every citizen of the United States, a resident of this state on the day of election, shall be entitled to vote at the first general election under this constitution, and on the question of the adoption thereof.

SEC. 6. This constitution shall be submitted to the people, for their ratification or rejection, at the general election to be held on Tuesday, the thirteenth day of November next. The executive of the existing government of California is hereby requested to issue a proclamation to the people, directing the prefects of the several districts, or in case of vacancy, the sub-prefects, or senior judge of first instance, to cause such election to be held on the day aforesaid, in their respective districts. The election shall be conducted in the manner which was prescribed for the election of delegates to this convention, except that the prefects, sub-prefects, or senior judge of first instance, ordering such election in each district, shall have power to designate any additional number of places for opening the polls, and that, in every place of holding the election, a regular poll-list shall be kept by the judges and inspectors of election. It shall also be the duty of these judges and inspectors of election, on the day aforesaid, to receive the votes of the electors qualified to vote at such election. Each voter shall express his opinion, by depositing in the ballot-box a ticket, whereon shall be written, or printed, "for the constitution," or "against the constitution," or some such words as will distinctly convey the intention of the voter. These judges and inspectors shall also receive the votes for the several officers to be voted for at the said election as herein provided. At the close of the election, the judges and inspectors shall carefully count each ballot, and forthwith make duplicate returns thereof to the prefect, sub-prefect, or senior judge of first instance, as the case may be, of their respective districts; and said prefect, sub-prefect, or senior judge of first instance shall transmit one of the same, by the most safe and rapid conveyance, to the secretary of state. Upon the receipt of said returns, or on the tenth day of December next, if the returns be not sooner received, it shall be the duty of a board of canvassers, to consist of the secretary of state, one of the judges of the superior court, the prefect, judge of first instance, and an alcalde of the district of Monterey, or any three of the aforementioned officers, in the presence of all who shall choose to attend, to compare the votes given at said election, and to immediately publish an abstract of the same in one or more of the newspapers of California. And

the executive will also, immediately after ascertaining that the constitution has been ratified by the people, make proclamation of the fact; and thenceforth this constitution shall be ordained and established as the constitution of California.

SEC. 7. If this constitution shall be ratified by the people of California, the executive of the existing government is hereby requested, immediately after the same shall be ascertained, in the manner herein directed, to cause a fair copy thereof to be forwarded to the president of the United States, in order that he may lay it before the congress of the United States.

SEC. 8. At the general election aforesaid, viz. the thirteenth day of November next, there shall be elected a governor, lieutenant-governor, members of the legislature, and also two members of congress.

SEC. 9. If this constitution shall be ratified by the people of California, the legislature shall assemble at the seat of government on the fifteenth day of December next, and in order to complete the organization of that body, the senate shall elect a president *pro tempore*, until the lieutenant-governor shall be installed into office.

SEC. 10. On the organization of the legislature, it shall be the duty of the secretary of state, to lay before each house, a copy of the abstract made by the board of canvassers, and, if called for, the original returns of election, in order that each house may judge of the correctness of the report of said board of canvassers.

SEC. 11. The legislature, at its first session, shall elect such officers as may be ordered by this constitution, to be elected by that body, and within four days after its organization, proceed to elect two senators to the congress of the United States. But no law passed by this legislature shall take effect until signed by the governor after his installation into office.

SEC. 12. The senators and representatives to the congress of the United States, elected by the legislature and people of California, as herein directed, shall be furnished with certified copies of this constitution, when ratified, which they shall lay before the congress of the United States, requesting, in the name of the

people of California, the admission of the state of California into the American Union.

SEC. 13. All officers of this state, other than members of the legislature, shall be installed into office on the fifteenth day of December next, or as soon thereafter as practicable.

SEC. 14. Until the legislature shall divide the state into counties and senatorial and assembly districts, as directed by this constitution, the following shall be the apportionment of the two houses of the legislature, viz.: the districts of San Diego and Los Angeles, shall jointly elect two senators; the districts of Santa Barbara and San Luis Obispo, shall jointly elect one senator; the district of Monterey, one senator; the district of San José, one senator; the district of San Francisco, two senators; the district of Sonoma, one senator; the district of Sacramento, four senators; and the district of San Joaquin, four senators. And the district of San Diego shall elect one member of the assembly; the district of Los Angeles, two members of assembly; the district of Santa Barbara, two members of assembly; the district of San Luis Obispo, one member of assembly; the district of Monterey, two members of assembly; the district of San José, three members of assembly; the district of San Francisco, five members of assembly; the district of Sonoma, two members of assembly; the district of Sacramento, nine members of assembly; and the district of San Joaquin, nine members of assembly.

SEC. 15. Until the legislature shall otherwise direct, in accordance with the provisions of this constitution, the salary of the governor shall be ten thousand dollars per annum; and the salary of the lieutenant-governor shall be double the pay of a state senator; and the pay of members of the legislature shall be sixteen dollars per diem while in attendance, and sixteen dollars for every twenty miles' travel by the usual route from their residences to the place of holding the session of the legislature, and in returning therefrom. And the legislature shall fix the salaries of all officers other than those elected by the people at the first election.

SEC. 16. The limitation of the powers of the legislature, contained in article eighth of this constitution, shall not extend to the first legislature elected under the same, which is hereby

authorized to negotiate for such amount as may be necessary to pay the expenses of the state government.

R. SEMPLE,

President, and delegate from Benicia.

WM. G. MARCY, Secretary.

J. ABAM,	L. W. HASTINGS,	R. M. PRICE,
C. T. BOTTS,	HENRY HILL,	HUGO REID,
E. BROWN,	J. HOBSON,	JACINTO RODRIGUEZ,
J. A. CARRILLO,	J. McH. HOLLINSWORTH,	PODRO SANSEVAINE,
J. M. COVARUBIAS,	J. M. JONES,	W. E. SHANNON,
E. O. CROSBY,	J. D. HOPPE,	W. S. SHERWOOD,
P. DE LA GUERRA,	T. O. LARKIN,	J. R. SNYDER,
L. DENT,	FRANCIS J. LIPPITT,	A. STEARNS,
M. DOMINGUEZ,	B. S. LIPPINCOTT,	W. M. STEUART,
K. H. DIMMICK,	H. M. McCARVER,	J. A. SUTTER,
A. J. ELLIS,	JOHN McDOUGAL,	HENRY A. TEFFT,
S. C. FOSTER,	B. F. MOORE,	S. L. VERMEULE,
E. GILBERT,	MYRON NORTON,	M. G. VALLEJO,
W. M. GWIN,	P. ORD,	J. P. WALKER,
H. W. HALLECK,	MIGUEL DE PEDRORENA,	O. M. WOZENCRAFT.
JULIAN HANKS,	A. M. PICO,	

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CONSTITUTIONAL CONSTRUCTION.

1. The destruction of a building to stop the spread of a conflagration, cannot be deemed a taking of private property for public use, within the meaning of that clause of the constitution which prohibits such taking without just compensation. *Dunbar v. The Alcalde of San Francisco*, 1 Cal. 355; *Surocco v. Geary*, 3 Cal. 69.

2. The states possess the power to arrest and restrain fugitive slaves and to remove them from their borders, but not so as to obstruct the owner in reclaiming his slave under the constitution of the United States. *In re Perkins*, 2 Cal. 424.

3. A deed void by reason of fraud, cannot be made valid by an act of the legislature so as to affect the rights of third persons. *Smith v. Morse*, 2 Cal. 524.

4. An act of the legislature authorizing the governor to appoint a judge of the supreme court during the absence of one of the judges from the state, is unconstitutional. *People v. Wells*, 2 Cal. 610.

5. The legislature can neither confer appellate jurisdiction on the district courts or original jurisdiction on the supreme court. *Caulfield v. Hudson*, 3 Cal. 389.

6. The cotemporaneous expositions of the first legislature, acquiesced in by every subsequent legislature, tacitly assented to by the courts, and where rights have grown up under it and it has become a rule of property, must govern in a question of constitutional law. *Washington v. Page*, 4 Cal. 389.

7. The constitution of this state is not to be considered as a grant of power, but rather as a restriction upon the powers of the legislature, and it is competent for the legislature to exercise all powers not forbidden by the constitution of the state, or delegated to the general government, or prohibited by the constitution of the United States. *People v. Coleman*, 4 Cal. 46; *People v. Bigler*, 5 Cal. 23; *Williams v. Thompson*, Jan. T. 1856.

8. The legislature in the exercise of any power granted or limited by the constitution, must use it for the public welfare, independent of any foreign or extraneous considerations. In re State Capital, Jan. T. 1854.

9. Courts have no authority to inquire into the motives of the legislature in the passage of any law; neither have they the right to declare from the face of a law that they were actuated by improper motives. *People v. Bigler*, 5 Cal. 23.

10. The district court has no appellate jurisdiction from the probate courts. *Reed v. McCormick*, 4 Cal. 342.

11. The act of Congress authorizing a transfer of causes from a state court to the United States court, because one of the parties is an alien, is not warranted by the constitution of the United States. *Johnson v. Gordon*, 4 Cal. 368.

12. No cause can be transferred from a state court to any court of the United States. *Id.*

13. In conferring upon county courts the power to prevent and abate nuisances, the legislature exceeded their constitutional authority. *Parsons v. Tuolumne Water Company*, 5 Cal. 43.

14. The legislature cannot exercise judicial functions, and cannot, therefore, except one case or one party from the operation of a general rule of law. *Guy v. Hermance*, 5 Cal. 73.

15. The states are not deprived by the constitution of the United States of the power to confer upon their own courts all admiralty and maritime jurisdiction, and therefore, the statute of California conferring such jurisdiction is constitutional and valid. *Taylor v. The Columbia*, 5 Cal. 268.

16. Congress has no power to confer jurisdiction upon the courts of a state. *Ex parte Knowles*, 5 Cal. 300. Neither can a state court voluntarily exercise power or take jurisdiction of a case under an act of Congress. *Id.*

17. The constitution of the United States does not prohibit the states from naturalizing aliens. *Id.*

18. The legislature cannot confer on one court the functions



and powers which the constitution has conferred on another. *Zander v. Coe*, 5 Cal. 230.

19. The performance of certain legislative functions being confided to, or imposed upon, the legislature by the constitution, must be exercised by that branch of the government and cannot be delegated by them. *People v. Nevada*, April T. 1856.

20. The legislature can impose no duties upon the judiciary but such as are of a judicial character. *Id.*

21. The incorporation of colleges and towns cannot be imposed upon the courts. *Id.*

22. The provision in the constitution "No person shall be twice put in jeopardy for the same offence," was not intended to apply to cases in which a judgment of conviction was reversed in the appellate court and a new trial ordered. *People v. March*, Oct. T. 1856.

23. The constitution is inoperative of itself and looks to legislation. *Cary v. Tice and Wife*, Oct. T. 1856.

24. The eighth article of the constitution is an express restriction upon the powers of the legislature, and the limitation applies to the necessary and ordinary expenses of government. *Nongues v. Douglass et al.* Jan. T. 1857.

25. The power of taxation is given to the legislature without limit for all purposes allowed by the constitution. *Id.*

26. The judiciary possesses the power to construe the constitution in all cases, not expressly or by necessary implication reserved to other departments. *Id.*

27. All debts contracted in violation of the eighth article of the constitution are void, and the legislature has no power to levy a tax or appropriate money for the payment thereof. *Id.*

28. The statute of a state cannot require a greater amount of proof for the authentication of the acts, records, etc., of the several states, than that prescribed by the act of Congress, but may require less. *Parke v. Williams*, Jan. T. 1857.

29. The grant of "legislative power" does not include the right to attack private property. *Billings v. Hall*, Jan. T. 1857.

30. The act of 1856, for the protection of settlers, declared unconstitutional. *Id.*

31. A board of supervisors appropriating private property without making provision for paying the value thereof, may be restrained by injunction. *McCann v. Sierra county*, Jan. T. 1857.

32. A tax imposed by law on Chinese passengers arriving in this state is unconstitutional. *People v. Downes*, Jan. T. 1857.

33. Power to appoint for a full term of office is vested in the legislature, and the governor has no right to exercise it. *People ex rel. v. Langdon*, 8 Cal. R. 1.

34. Under the constitution, the legislature can make such dis-

position of county revenues as it may deem proper. *People ex rel. v. Williams*, 8 Cal. R. 97.

35. The power of Congress to regulate commerce is exclusive, when exercised. The act of Congress of July 29, 1850, authorizing mortgages of vessels to be recorded, and making the record thereof notice to third parties, being in conflict with our statute of frauds, the latter must yield. *Mitchel v. Steelman*, 8 Cal. R. 363.

36. The appellate power of the supreme court is given by the fourth section of the sixth article of the constitution, and therefore the legislature can pass no act impairing it, but it may prescribe the mode in which appeals may be taken. *Haight et al. v. Gay et al.*, 8 Cal. R. 297.

37. The legislature cannot delegate its general legislative powers, but it can authorize others to do those things which it cannot, understandingly or advantageously, do itself. *Upham v. Supervisors of Sutter county*, 8 Cal. R. 378.

38. The legislature can delegate the power to the voters of a county to select a county seat therein. *Id.*

39. The constitution does not require that the district courts shall be held at a county seat. *Id.*

40. Section seventeen of article fourth of the constitution provides, that the governor shall have ten days for the consideration of bills which have passed both houses of the legislature: the ten days must be computed by excluding the day on which the bill is presented to him. *Price v. Whitman et al.*, 8 Cal. R. 412.

41. The legislature has no power to impose or superadd conditions to a contract after it is completed, as this would be to impair its obligations, and this is prohibited by the constitution. *Robinson et al. v. Magee*. 9 Cal. R. 81.

42. The legislature has the power to confer criminal jurisdiction on justices' courts. *The People v. Fowler*, 9 Cal. R. 85.

43. The provision of the Practice Act, authorizing judgment, personal and final, against an absent defendant, with privilege to the defendant to come in and deny in six months, is not in violation of the constitution of the United States or this state. *Ware et al. v. Robinson et al.*, 9 Cal. R. 107.

44. The provisions of section fifteen of article six of the constitution, respecting the salaries of district judges, do not exempt those officers from the necessity of an appropriation for that purpose by the legislature. *Myers v. English*, 9 Cal. R. 341.

45. The constitution vests in the legislature the power of controlling and disposing of the revenue of the state. *Id.*

46. The provision of the constitution which prohibits the passage of any law impairing the obligation of contracts, relates solely to contracts between individuals, and not to contracts between individuals and the state. *Id.*

47. An act of the legislature prohibiting, under a penalty, the pursuing of any ordinary business on the Christian Sabbath or Sunday, is in conflict with the first and fourth sections of article first of the constitution, and is therefore void. *Ex parte Newman*, 9 Cal. R. 502.

48. Such an act would be, in effect, a discrimination in favor of one religious profession over all others, and as such would be in violation of the constitution. *Id.*

49. The act of April 10, 1858, to provide for the better observance of the Sabbath, declared unconstitutional. *Id.*

50. The right of property in slaves is recognized by the constitution of the United States; and the right of transit through each state with every species of property known to that constitution, is secured by that instrument as the paramount law to each citizen, and does not depend upon the uncertain and changeable ground of mere comity. In the matter of Archy, 9 Cal. R. 147.

51. This privilege extends only to a party who comes into the state for pleasure or health, and if he engages in business, or employs his slave in any business except as a personal attendant upon himself or family, the privilege is lost, and his slave is entitled to his freedom under the eighteenth section of article first of the state constitution. *Id.*

52. The federal office of surveyor-general is a "lucrative office," and the office of comptroller of state an "office of profit," under the twenty-first section of the fourth article of the constitution of this state. *People ex rel. v. Whitman*, 10 Cal. R. 38.

53. To constitute the "holding" of an office, within the meaning of the constitution, there must be the concurrence of two bills—that of the appointing power, and that of the person appointed. *Id.*

54. The failure on the part of the comptroller elect to qualify creates no vacancy in the office; and in this case the incumbent holds over until his successor is elected and qualified. *Id.*

55. The executive can appoint only when there is no incumbent. *Id.*

56. The first clause of the fourth section of article six of the constitution, which section provides, that "the supreme court shall have appellate jurisdiction in all cases when the matter in dispute exceeds two hundred dollars; when the legality of any tax, toll, or impost, or municipal fine is in question; and in all criminal cases amounting to felony, on questions of law alone," is construed to mean that the supreme court shall possess appellate jurisdiction in all cases; *provided*, that when the subject of litigation is capable of pecuniary computation, the matter in dispute must exceed in value or amount two hundred dollars, unless a question of the legality of a tax, toll, impost, or muni-

cial fine is drawn in question. *Conant v. Conant*, 10 Cal. 249.

57. The supreme court possesses appellate jurisdiction from a decree rendered in a suit for divorce from the bonds of matrimony. *Id.*

58. The act of the legislature, giving the power to the late superior court of the city of San Francisco, to send its process beyond its territorial limits, was constitutional. *Hickman v. O'Neal*, 10 Cal. R. 292.

59. There is no constitutional provision prohibiting the legislature giving to an inferior court the right to have its orders or judgments enforced beyond its territorial limits. *Id.*

60. A judgment rendered in one state, and upon which suit is instituted in another, is a contract in the sense of the constitution. *Scarborough v. Dugan*, 10 Cal. R. 305.

61. The legislature has no right so to regulate the remedy, as that it shall destroy the contract by denying all means of enforcement. *Id.*

62. The twenty-fifth section of article six of the constitution, which requires that every law enacted by the legislature shall embrace but one object, and that shall be expressed in the title, is merely directory; it does not defeat laws passed in violation of it. *Pierpont v. Crouch*, 10 Cal. 315.

63. The court of sessions under the constitution, can only exercise powers of a judicial character. *Hardenburg et. al. v. Kidd et. al.*, 10 Cal. R. 402.

64. The assessment of taxes is not a judicial act; it partakes of no element of a judicial character. It is a legislative act; it requires the exercise of legislative power, which, for certain governmental purposes in the county, may be devolved upon a board of supervisors, but cannot be delegated to any branch of the judicial department. *Id.*

65. The provisions of the revenue act of 1853 and 1854, authorizing the court of sessions to assess a tax for county purposes are unconstitutional, and the assessment made thereunder, and a subsequent levy upon and sale of property in the enforcement of such assessment, are void. *Id.*

66. Section fifth of article six of the constitution providing for the election of district judges, declares that they "shall hold their office for the term of six years." The legislature can direct the time, and prescribe the mode of election, but cannot change the tenure of the office. That part of the act of the legislature providing, in case of a vacancy in the office of district judge, for an election "to fill an unexpired term," is unconstitutional. The people *ex. rel. v. Burbank*, January T., 1859.

67. The election was valid, and the judge elect was entitled to hold the office for the full term of six years, notwithstanding

the proclamation of the governor was for an unexpired term, and the commission to the same effect. The function of the proclamation was not to declare the law but the fact of a vacancy. *Id.* See also, the *People v. Templeton*, and the *People v. Norton*, same term.

68. Sections fifty-six and fifty-seven of the Consolidation Act, applicable to the city of San Francisco, passed April 19, 1858, providing for the repairing of the streets, is constitutional. *Hart v. Gaven*, January T., 1859.

69. An act providing for the repairing the streets is in the nature of a tax, and, if uniform and equal in its operation, as applying to all the streets of a municipality, is not in conflict with the thirteenth section of article eleven of the constitution. *Id.*

70. By the common law, which has been adopted in this state, an alien cannot acquire property by descent or other mere operation of law; the seventeenth section of article first of the constitution only removes the disability of aliens who are *bona fide* residents in the absence of any statute changing this rule. *Farrell and Wife v. Enright*, January T., 1859.

71. The legislature has no right to authorize one of its officers to enter upon and dispossess one of its citizens in actual possession of real estate with color of title. *McCauley v. Weller*, January T., 1859.

72. The act of February 26, 1858, authorizing the governor to enter and take possession of the state prison while in the legal custody of one entitled thereto, without providing any compensation therefor, was in violation of the eighth section of article first of the constitution. *Id.*

73. The constitutional limitation on the power of the legislature will be strictly construed, and the limitation will extend no farther than the words used will carry out. Because the legislature is forbidden to contract a debt beyond a certain amount, and pledge the general fund for its payment, it does not follow that they may not authorize one or more counties to incur such debt, which would create a lien on the local not the general fund. *Pattison v. Board of Supervisors of Yuba county*, April T., 1859.

74. That part of the statute of March 23d, 1850, giving jurisdiction to the county judge to try a contested election for an office "in and for such county," is constitutional. *Saunders v. Haynes*, April T., 1859.

75. An inspector of customs of the United States, is not a lucrative office in the sense of the twenty-first section of article four, so as to render ineligible to a state office. *Id.*

76. The powers and duties of the judges of the supreme court are prescribed by the constitution, and the legislature can neither

add to or subtract from them. That part of the sixty-ninth section of the act of May 15th, 1854, is inoperative as applying to the judges of the supreme court. *Houston v. Williams*, January T., 1859.

77. The fourth section of article six of the constitution, providing, among other things, that the supreme court shall have jurisdiction, where the "amount in dispute exceeds two hundred dollars," is intended to apply to cases where the amount exceeds two hundred dollars exclusive of costs. *Hildreth v. Gwindon, et al.*, January T., 1859.

78. The thirteenth section of article eleven of the constitution does not restrict the legislature either in the amount of tax which may be imposed, or the purposes to which it may be applied. The people *ex rel. v. E. W. Burr et al.*, composing the Board of Fund Commissioners, April T., 1859.

79. The thirty-seventh section of article four of the constitution, is not a restriction upon the actual control of the legislature over the whole subject of municipal taxation at all times. *Id.*

80. The act of April 20th, 1858, providing of the funding and payment of outstanding claims against the city and county of San Francisco, is constitutional. *Id.*

81. The seventeenth section of article first of the constitution, providing that foreigners who are *bona fide* residents, may inherit, etc., does not restrict the power of the legislature to confer additional privileges. The People *ex rel. v. R. C. Rogers*, administrator, *et al.* April T., 1859.

82. The act of April 19th, 1856, concerning escheated estates is constitutional. *Id.*

## CHAPTER II.

ACKNOWLEDGMENT AND PROOF OF INSTRUMENTS TO BE RECORDED,  
AND OF SATISFACTION AND DISCHARGE OF JUDGMENTS AND OTHER  
LIENS.

By the laws of the states of California and Oregon, and of the territory of Washington, deeds, mortgages, and other instruments, must be recorded in the county in which any lands affected by such instrument lie, in order to give notice to all other parties of the transfer made, or other act performed by such instrument.

In *California* and *Oregon*, these instruments are recorded in the office of the county recorder, and in *Washington* in the office of the auditor. In *California*, the office of county recorder is in some counties united with that of county clerk.

The proper time for recording instruments, in *California*, is immediately after they are executed and delivered; in *Oregon* within thirty days; and in *Washington* within six months.

As a prerequisite to such recording, the instrument must be acknowledged or proved before the proper officer, and such acknowledgment or proof must be certified by the officer in the proper form; or the purposes of such recording will not be effected.

If such deed or other instrument be not lawfully acknowledged and recorded, it will still be valid between the parties to the same and their representatives—but will not hold good as against the title of a subsequent purchaser in good faith, and for a valuable consideration, whose deed shall have been duly acknowledged and recorded.

In *California* it is decided that open notorious possession of real estate by one having an unrecorded deed for it, at the time of the acquisition of title or deed by the subsequent vendee from the common vendor, is notice to the subsequent vendee; and such subsequent vendee or purchaser is not a purchaser in good

faith, within the meaning of the statute, and cannot hold the land against the unrecorded title of the first purchaser.<sup>1</sup>

The proper officers to take and certify such acknowledgment or proof for *California*<sup>2</sup> are

1. *In the state*—some judge or clerk of a court having a seal, some notary public, or justice of the peace of the proper county, the county recorder of the county, and recorders and mayors of cities.

Judges of the Supreme Court, of the district courts, and of the county courts, may act in any part of the state; justices of the peace and recorders within their respective counties; and mayors and recorders within their respective cities.<sup>3</sup>

It is generally considered that justices of the peace, recorders, county and city, and mayors, can only take acknowledgments affecting lands lying within their respective counties or cities; and a question has been suggested by some practitioners, whether notaries do not come within the same restriction. The general opinion, however, in view of the whole tenor of the adjudications of the Supreme Court upon the matter of acknowledgments, is, that notaries may take the acknowledgment and proof of the execution of deeds and other instruments, affecting lands situated in any county of the state—and such is the usual practice with notaries.

The acknowledgments of married women to instruments affecting their separate property, can only be taken before a justice of the Supreme Court, a judge of the District Court, a county judge or notary public.<sup>4</sup> This does not apply to instruments affecting the homestead; they may be acknowledged by a married woman before a justice of the peace as well as the officers above named.<sup>5</sup> When she conveys by her sole deed, in consequence of the non-residence of her husband, the district judge of the county in which the land lies, must take the acknowledgment.<sup>6</sup>

2. *Out of the state, but within the United States*—some judge or clerk of any court of the United States, or of any state or

<sup>1</sup> Hunter v. Watson, Jan. Term, 1859.

<sup>2</sup> Wood's Dig. arts. 841, 717, 2844, and 2977.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.* 2609.

<sup>5</sup> Goode v. Smith and Wife, Jan. Term, 1836.

<sup>6</sup> Wood's Dig. art. 2630.



territory having a seal, or any commissioner appointed by the government of this state for that purpose.<sup>1</sup>

But acknowledgments of *married women* as to their separate property, out of the state, can only be taken before such a judge of a court of record or commissioner.<sup>2</sup>

3. *Out of the United States*—some judge or clerk of any court, of any state, kingdom, or empire having a seal, or any notary public therein, or any minister, commissioner, or consul of the United States appointed to reside therein.<sup>3</sup>

The proper officers to take acknowledgments for *Oregon* are as follows:

1. *In the state*—any judge of the district court, probate judge, justice of the peace, or notary public; and the deed must be witnessed by two subscribing witnesses.<sup>4</sup>

2. *Out of the state, but in the United States*—any judge of a court of record, justice of the peace, or notary public, or other officer authorized by the local laws to take acknowledgments, or a commissioner appointed by the governor of Oregon for such purpose; and such deed may be executed according to the laws of the state, territory, or district. In such cases, the statute of Oregon provides as follows:

SECTION 12. In the cases provided for in the last section, unless the acknowledgment be taken before a commissioner appointed by the governor of this state for that purpose, such deed shall have attached thereto a certificate of the clerk, or other proper certifying officer of a court of record of the county or district within which such acknowledgments were taken, under the seal of this office, that the person whose name is subscribed to the certificate of acknowledgment was, at the date thereof, such officer as he is therein represented to be, and that he believes the signature of such person subscribed thereto to be genuine; and that the deed is executed and acknowledged according to the laws of such state, territory, or district.<sup>5</sup>

3. *In any foreign country*—the officers mentioned in the following provision of the Oregon statute, are the proper officers to take acknowledgments:

SECTION 13. If such deed be executed in a foreign country, it

<sup>1</sup> Wood's Dig. art. 341.

<sup>2</sup> Id. 2609.

<sup>3</sup> Id. 341.

<sup>4</sup> Statutes of Oregon, p. 520.

may be executed according to the laws of such country, and the execution thereof may be acknowledged before any notary public therein, or before any minister plenipotentiary, minister extraordinary, minister resident, *charge d'affaires*, commissioner or consul of the United States appointed to reside therein, which acknowledgment shall be certified thereon by the officer taking the same under his hand; and if taken before a notary public, his seal of office shall be affixed to such certificate.

The proper officers to take acknowledgments for the territory of *Washington* are, a judge of the Supreme Court, a judge of the Probate Court, a justice of the peace, a notary public, or a commissioner of deeds.<sup>1</sup>

Every certificate should show that the person making the acknowledgment or proof, is personally *known* to the officer, or is proved by a competent witness to be such person, and should be signed by the officer, with his seal of office affixed, if he have one. If he be a judge or clerk, the seal of the court must be affixed. It should also state his full title, and the true date of the act—and that the person executed the same fully and voluntarily for the uses and purposes therein mentioned.<sup>2</sup> In *Oregon* it should also state the residence of the witness. *See post.* In *Washington* no provision is made for proof of instrument by witness.

When the acknowledgment is made by a married woman it should show also that she was made acquainted with the contents of the conveyance, and acknowledge, on examination apart from and without the hearing of her husband, that she executed the same fully and voluntarily, without fear or compulsion, or undue influence of her husband, and that she does not wish to retract the execution of the same.<sup>3</sup>

For *Oregon*, if made in the state, it should show that the acknowledgment was taken separately and apart from her husband, and that she acknowledged that she executed such deed freely, and without fear or compulsion of any one. If made out of the state, the acknowledgment or proof may be the same as if she were sole.<sup>4</sup>

For *Washington*—it should state that the officer has examined her separate and apart from her husband, and made known to

<sup>1</sup> Laws of Wash. 402, 445.

<sup>2</sup> Id. 379; 9 Cal. 15.

<sup>3</sup> Wood's Dig. art. 341, 344-350.

<sup>4</sup> Laws O. p. 520.

her the contents of the deed, and that she acknowledged that she did voluntarily, of her own free-will, and without the fear of or coercion from her husband, execute the deed.<sup>1</sup>

In every case the husband joins with the wife in the execution of the instrument—excepting in *California*, the cases of a female sole-trader, and where the wife is allowed to make conveyance alone, in consequence of the non-residence of her husband; and probably in the case of an inventory of her separate property,<sup>2</sup> although even in such case, the safer and usual course is for the husband to unite in the execution of the instrument.—See HUSBAND AND WIFE—FORMS.

When the execution of instruments is proved by the testimony of a subscribing witness, the certificate should show that the witness is personally known to the officer to be the person whose name is subscribed to such instrument as a witness thereto, or was proved to be such, by the oath or affirmation of a reliable witness, whose name must be inserted in the certificate.

The certificate must then set forth the proof given by such witness, of his residence, of the execution of the instrument, and of the facts that the person whose name is subscribed to such instrument as a party thereto, is the party who executed the same, and that such witness subscribed his name to such instrument as a witness thereof.<sup>3</sup>

When, in the absence or death of the subscribing witnesses, the proof is made by evidence of handwriting, the certificate must show: 1. That the officer is satisfied that all the subscribing witnesses to the instrument are dead or cannot be had to prove its execution. 2. That A B, a competent and credible witness, stated on oath or affirmation, that he personally knew the individual whose name is subscribed to the instrument as a party, well knew his signature (stating his means of knowledge), and believes the name of the person subscribed thereto as a party, was subscribed by such person. 3. That C D, a competent and credible witness, gave the like proof as to the (or one of the) subscribing witnesses, setting it out at length.<sup>4</sup>

*In Oregon*, proof may be made by a subscribing witness before

<sup>1</sup> Laws Wash. 402.

<sup>2</sup> Wood's Dig. art. 347-350.

<sup>3</sup> Wood's Dig. art. 2609, 2680, and 2607; In Goldsby v. Ricardo, Jan. Term, 1857.

<sup>4</sup> Id. 351, 352.

any officer authorized to take acknowledgments of deeds, who is personally acquainted with such witness, or has satisfactory evidence that he is the same person who was a subscribing witness; and the witness must state his own place of residence, and that he knew the person described and who executed such conveyance. When any grantor is dead, out of the state, or refuses to acknowledge, and all the subscribing witnesses are dead, or out of the state, proof may be made before the District Court, or any judge thereof, by proving the handwriting of the grantor and of any subscribing witness.<sup>1</sup>

Every certificate which substantially conforms to the requirements of the law will be valid, although the identical language of the statute may not be used.<sup>2</sup>

All interlineations or erasures, if not noted before execution, should be mentioned in the certificate.

A notary or other officer authorized to make and certify acknowledgments, and the proof of the execution of deeds, and other instruments, cannot alter or correct his certificate to reform the same, even to insert the statement of a fact inadvertently omitted, after some decisive act is done, showing that he has exercised his authority over the subject. After taking the acknowledgment, and making and delivering the return, his functions cease, and he is discharged from all further authority.<sup>3</sup>

The satisfaction of a mortgage, or of a judgment, must be proved or acknowledged, and certified in the same manner as a conveyance, unless such satisfaction be entered upon the margin of the original record of the mortgage, when it is acknowledged in the presence of the recorder or his deputy, who signs the same as a witness.<sup>4</sup>

Upon application under oath that a witness residing in the county refuses to appear and testify to the execution of an instrument, and that the same cannot be proved without his evidence, the notary, or other officer, may issue a subpoena to the witness, who, in case of refusing to appear or to answer, will be liable to

<sup>1</sup> Laws of Oregon, p. 531.

<sup>2</sup> Wood's Dig. art. 860; Goode v. Smith, Jan. Term, 1859.

<sup>3</sup> Bours v. Zachariah and wife. Oct. Term, 1858.

<sup>4</sup> Wood's Dig. art. 874, 875, 942; Prac. Act, § 208.

fine, damages, and imprisonment until he shall submit to answer.<sup>1</sup>

*In Oregon*, the statute is substantially the same except that the witness is not liable in damages. A commissioner of deeds is not authorized to issue the subpoena.<sup>2</sup>

## FORMS.

*Certificate of Acknowledgment by Party known to the Officer.*

State of California,  
City and County of San Francisco. } ss:

On this first day of February, A. D. one thousand eight hundred and fifty-nine, before me, S. Hermann, a notary public in and for said city and county, duly commissioned and sworn, personally appeared the within named H. Bancroft, whose name is subscribed to the annexed instrument, as a party thereto, personally known to me to be the individual described in and who executed the said annexed instrument, who acknowledged to me that he executed the same freely and voluntarily, and for the uses and purposes therein mentioned.

In witness whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

S. HERMANN. [L. s.]  
Notary Public.

*Certificate where the Identity of Party is proven to the Officer.*

State of California,  
City and County of San Francisco. } ss:

On this fifth day of December, A. D. one thousand eight hundred and fifty eight, before me, M. C. Blake, judge of the county court, in and for said city and county, the same being a court of record and having a seal, personally appeared W. Crane, satisfactorily proven to me by the oath of R. Perkins, a competent and credible witness, by me duly sworn for that purpose, to be the individual described in and who executed the annexed instrument, and the said W. Crane acknowledged to me that he executed the same freely and voluntarily, and for the uses and purposes therein mentioned.

In witness whereof, I have hereunto set my hand and caused the seal of said county court to be affixed, the day and year in this certificate first above written. M. C. BLAKE, [L. s.] Judge.

<sup>1</sup> Wood's Dig. art. 853, 854

<sup>2</sup> Laws O. 521.

*By Attorney known to the Officer.*

State of California,  
City and County of San Francisco. } ss:

On this fifth day of October, A. D. one thousand eight hundred and fifty-seven, before me, W. Duer, clerk of the county court of said city and county, personally appeared C. T. Emmet, personally known to me to be the same person who executed by power of attorney the foregoing deed, as the attorney in fact of James Thompson, said James Thompson being named in the annexed instrument as a party thereto, and therein described as the party executing the same; and the said C. T. Emmet acknowledged to me that he executed the same freely and voluntarily, as, and for the act and deed of the said James Thompson, and for the uses and purposes therein mentioned.

In witness whereof, I have hereunto set my hand and affixed the seal of said county court, the day and year in this certificate first above written.

W. DUER, [L. S.] Clerk.

*Certificate of Proof by subscribing Witness known or procen to the Officer.*

State of California,  
City and County of San Francisco. } ss:

On this 12th day of October, A. D., one thousand eight hundred and fifty-seven, before me, W. H. Culver, a Justice of the Peace in and for said city and county, duly commissioned and sworn, personally appeared A. B., personally known to me [or, satisfactorily proved to me by the oath of E. F., a competent and credible witness for that purpose, by me duly sworn,] to be the same person whose name is subscribed to the annexed instrument as a witness thereto, who being by me duly sworn deposes and says, that he resides in the city and county of San Francisco, that he was present and saw C. D., personally known to him to be the same person described in and who executed the annexed instrument, as a party thereto, sign, seal, and deliver the same; and heard him acknowledge that he executed the same freely and voluntarily, and for the uses and purposes therein mentioned, and that he, the deponent, thereupon signed his name as a subscribing witness thereto, at the request of the said C. D.

In witness whereof, I have hereunto set my hand the day and year in this certificate first above written.

WILLIAM H. CULVER,  
Justice of the Peace.

*By Husband and Wife known to the Officer.*

State of California, }  
 City and County of San Francisco. } ss:

On this tenth day of July, A. D. one thousand eight hundred and fifty-eight, before me, Frederick J. Thibault, a notary public in and for said city and county, duly commissioned and sworn, personally appeared John Smith and Sarah his wife, whose names are subscribed to the annexed instrument as parties thereto, personally known to me to be the individuals described therein, and who executed the same, and they, and each of them, acknowledged to me that they executed the said instrument, each respectively, freely and voluntarily, and for the uses and purposes therein mentioned. And I do hereby further certify, that the said Sarah Smith, wife of the said John Smith, is personally known to me to be the person whose name is subscribed to said instrument as a party thereto, and that she was by me first made acquainted with the contents thereof, and thereafter acknowledged to me on examination separately, apart from and without the hearing of her said husband, that she executed the same freely and voluntarily for the uses and purposes therein mentioned, without fear or compulsion, or undue influence of her said husband, and that she did not wish to retract the execution of the same.

In witness whereof, I have hereunto set my hand and affixed my official seal, the day and year in this certificate first above written.

FREDERICK J. THIBAULT, [L. s.]  
 Notary Public.

*By Husband and Wife proven to the Officer.*

State of California, }  
 County of } ss:

On this first day of May, before me, &c., &c., [as in the preceding forms], personally appeared John Smith and Sarah his wife, whose names are subscribed to the foregoing deed as parties thereto, satisfactorily proven to me to be the persons described in and who executed the within conveyance, by the oath of James Brown, a competent and credible witness for that purpose, by me duly sworn; and thereupon they, the said John Smith and Sarah his wife, and each of them, acknowledged to me that they executed the said instrument freely, and voluntarily, for the uses and purposes therein mentioned. And I further certify, that the said Sarah Smith, wife of the said John Smith, being first made acquainted with the contents of said instrument, on an examination separate and apart from and without the hearing of her said husband, acknowledged to me, that she

executed the same freely and voluntarily, without fear or compulsion, or undue influence of her husband, and that she does not wish to retract the execution of the same.

Witness my hand and seal, &c.

*Proof of the Execution of an Instrument, where the Subscribing Witnesses are Dead or Absent.*

State of California,  
City and County of San Francisco. } ss:

On the ninth day of May, A. D., 1858, before me, Samuel Hermann, a notary public, in and for said county, duly commissioned and sworn, personally appeared F. H. Woods and J. H. Stebbins, competent and credible witnesses to me personally known; and the said F. H. Woods, being by me duly sworn, deposed and stated on oath, that he personally knew T. M. Leavenworth, whose name is subscribed to the annexed instrument as a party thereto; that he well knew said Leavenworth's signature, from having frequently seen him sign his name, and believed the name of said Leavenworth so subscribed to said instrument as a party thereto, was subscribed by said Leavenworth. And the said J. H. Stebbins, being by me duly sworn, stated, that he knew R. A. Lockwood and John T. Doyle, [or, well knew R. A. Lockwood, one of the persons] whose names are subscribed as witnesses to said instrument; that he well knew their signatures from having frequently seen them sign their names; and that he believed the names of the said R. A. Lockwood and John T. Doyle, subscribed thereto as witnesses, were subscribed by said persons. And I hereby certify, that I am satisfied that none of the subscribing witnesses to said instrument can be had to prove the execution thereof; the said R. A. Lockwood being dead, and the said John T. Doyle being absent from the state of California.

Witness my hand and seal, &c. [*as in the foregoing forms.*]

*Execution of Deed by a Corporation.*

State of California,  
City and County of San Francisco. } ss:

On this, &c., [date] before me personally came A. B., the president of the Table Mountain Mining Company, to me personally known to be the individual whose name is subscribed to the foregoing instrument as the president of the Table Mountain Mining Company, and he acknowledged to me that he executed the same as the president of said company for and on the behalf and in the name of said company, as its free and voluntary act and deed for the uses and purposes therein mentioned; and in



pursuance of the order and resolution of said company directing such deed to be executed; by signing the same as president thereof and affixing thereto its corporate seal.

In witness whereof, &c., &c.

*Another Form.*

State of California, }  
County of Tuolumne. } ss:

On this, &c., [date] before me came M. N., to me personally known to be the president of the Bald Hill Quartz Mining Company, and the same person who as its president has executed the same,\* who being by me duly sworn said, that in pursuance of the direction of the managers of said company, he had executed the same by affixing thereto the corporate seal of said company, and by signing the same as such president.

In witness whereof, &c., &c.

*Another Form.*

[Proceed as in preceding form to\*, and then add] by signing the said instrument and affixing thereto the corporate seal of said company; and he thereupon acknowledged to me that as and for the act and deed of said company, and by direction thereof, he executed the same freely and voluntarily for the uses and purposes therein mentioned.

In witness whereof, &c., &c.

*Acknowledgment by a Married Woman whose Husband is not Residing in the State.*

State of California, }  
County of . } ss:

On this day of 1859 before me M. N., district judge of the judicial district, in and for said county of personally appeared Mrs. Mary Landers, a married woman, to me personally known to be the individual described in and who executed the foregoing instrument; and at the same time, also appeared John Doe and R. Roe, two credible and disinterested citizens of this state, to me personally known as such, who being by me severally sworn each for himself said, that he is a citizen of the state of California and a resident of the town of , county , that he is acquainted with the said Mary Landers, and with Hugh Landers her husband, and has known them, and each of them, for more than one year past. That more than one year ago, to wit: eighteen months ago, the said Hugh Landers deserted his wife, the said Mary Landers, and went to Sonora, Mexico, to reside; announcing his determination

and intention to that effect, and has never since returned. That according to the full belief of deponent, the said Hugh does not reside in this state, and for one year and more next preceding this date, he has not been *bona fide* residing in this state. All of which is to me satisfactory proof thereof. And thereupon the said Mary Landers acknowledged to me that she executed the said instrument freely and voluntarily for the uses and purposes therein mentioned.

In witness whereof I have hereto set my hand and caused the seal of said district court to be affixed the day and year first above written. M. N. [L. s.], District Judge.

*Acknowledgment by Servant on a Service Contract.*

Santa Cruz County, ss:

On this first day of, &c., before me personally came Sarah Ford, personally known to me to be the individual described in, and who executed the within contract; and she acknowledged to me on a private examination by me made that she executed the same freely and voluntarily, for the uses and purposes therein mentioned.

Witness my hand, &c., and the seal of the, &c. G. M. [L. s.]  
County Judge of Santa Cruz County.

*By Attorney proven to the Officer.*

State of California, }  
County of El Dorado, } ss:

On this fifth day of May, &c., before me personally came A. B., proven satisfactorily to me to be the same person described in, and who executed the within conveyance, as the attorney in fact of C. D., by the oath of G. H., a competent and credible witness for that purpose, by me duly sworn; and thereupon, the said A. B. acknowledged before me that he executed the same, as and for the act and deed of the said C. D., freely and voluntarily, for the uses and purposes therein mentioned.

E. H., Justice, &c.

*By an Executor or Administrator or Trustee.*

State of California, }  
Yuba County, } ss:

On this fifth day of May, &c., before me personally came A. B., personally known to me to be the executor of the last will and testament [or, administrator of the estate] [or, trustee of the estate] of C. D., mentioned and described in the within conveyance, and the said A. B. acknowledged before me that he

executed the same, as such executor, [or administrator,] [or trustee,] as aforesaid, freely and voluntarily for the uses and purposes therein mentioned.

In witness, &c.

E. F., Justice, &c.

*By a Sheriff.*

State of California, }  
City and county of San Francisco, } ss:

On this fifth day of May, &c., before me personally came Charles Doane, Esquire, sheriff [or late sheriff, *as may be*,] of the said city and county of San Francisco, to me personally known to be the same individual described in, and who executed the foregoing instrument, and signed his name thereto as such sheriff, and acknowledged to me that he executed the same freely and voluntarily for the uses and purposes therein mentioned.

In witness whereof, I have hereunto set my hand and official seal [ &c.; date.]

E. P. PECKUM, Notary Public.

*By a Party to confirm Deed executed during Infancy.*

State of California, }  
Los Angeles County, } ss:

On this fifth day of May, &c., before me personally came A. B., to me personally known to be the individual described in, and who executed the within conveyance, and thereupon duly acknowledged that the said conveyance was formerly executed by him when he was an infant under twenty-one years; that he has since arrived at full age, and is desirous of confirming his former execution thereof; and that he now acknowledges that he executed the same, as and for his act and deed freely and voluntarily for the uses and purposes therein mentioned.

E. F., Justice, &c.

*Certificate of Proof by Subscribing Witness known to the Officer for Oregon.*

State of Oregon, }  
Multnomah County, } ss:

On this fifth day of May, &c., before me personally came C. D., subscribing witness to the within conveyance, to me personally known to be the person whose name is subscribed to said instrument as one of the witnesses thereto, who, being by me duly sworn, did depose and say, that he resided in the city of Portland, in said county; that he knew A. B., the individual described in, and who executed the said conveyance; that he was present and saw the said A. B. sign, seal, and deliver the same, as and for his act and deed; and that the said A. B. acknowledged

the execution thereof: whereupon the said C. D. became the subscribing witness thereto.

E. F., Justice, &c.

*By Subscribing Witness proven to the Officer.*

State of Oregon, }  
Multnomah County, } ss:

On this fifth day of May, &c., before me personally came M. N. and C. D., and the said M. N., to me personally known, having been by me duly sworn, did depose and say, that he resided in the city of Portland in said county; that he was acquainted with the said C. D., the subscribing witness to the within conveyance, and that he knew him to be the same person, which is to me satisfactory evidence thereof; and the said C. D., being by me duly sworn, &c., [to the end.]

E. F., Justice, &c.

*By Subscribing Witness to Deed executed by an Attorney.*

State of California, }  
Santa Clara County, } ss:

On this fifth day of May, &c., before me personally came C. D., to me personally known to be the person whose name is subscribed to the within conveyance as a witness thereto, who, being by me duly sworn, did depose and say, that he resided in the town of Gilroy, in said county; that he knew A. B. to be the person described in, and who executed the within conveyance, as the attorney in fact of M. N. therein named; that he was present and saw the said A. B. execute the same as such attorney, and that he, the said C. D., thereupon became the subscribing witness thereto.

Witness, &c.,

WM. W. WIGGINS, [L. s.]  
Notary Public.

*Acknowledgment by Husband and Wife in Oregon.*

State of Oregon, }  
County } ss:

Be it remembered, that on this fifth day of May, &c., before me, a justice of the peace in and for the county aforesaid, appeared A. B., and Jane his wife, to me personally known to be the individuals described in and who executed the within deed, and severally acknowledged that they had severally executed the same, for the uses and purposes therein mentioned: And the said Jane, on a private examination, separate and apart from her husband, acknowledged that she executed the within instrument freely, and without fear or compulsion from any one. And I further certify, that the persons who made such acknowledg-

ment are known to me to be the individuals described in, and who executed the within instrument. E. F., Justice, &c.

*The same in Washington Territory.*

Territory of Washington, } ss:  
Whatcom County,

Be it remembered, that on the fifth day of May, &c., before me, the subscriber, one of the justices of the peace in and for said county, personally appeared A. B. and Jane his wife, to me personally known to be the individuals described in and who executed the within deed, and severally acknowledged that they had executed the same. And the said Jane, after I had made known and explained to her the contents of the said deed, on an examination, separate and apart from her said husband, acknowledged the same to be her act and deed, and that she executed the same voluntarily of her own will and without the fear or coercion of her said husband. E. B. K., Justice, &c.

*Satisfaction of Mortgage and Acknowledgment, by individual known to the Officer.*

I, A. B., of the town of \_\_\_\_\_, in the county of \_\_\_\_\_, and state of \_\_\_\_\_, do hereby certify, that a certain mortgage, bearing date the \_\_\_\_\_ day of \_\_\_\_\_, in the year one thousand eight hundred and \_\_\_\_\_, made and executed by C. D., of the first part, to me, the said A. B., of the second part, and recorded in the office of the recorder of the county of \_\_\_\_\_, in book 24 of mortgages, at pages 50 and 51, on the fifth day of May, A. D., 1860, [*if the mortgage has been assigned, insert the name of the assignee instead of A. B., at the commencement of the certificate; omit the words "me the said" in Italic, and insert here:* and which said mortgage was duly assigned to me by the said A. B., the mortgagee above named, by assignment dated the \_\_\_\_\_ day of \_\_\_\_\_, in the year \_\_\_\_\_, and recorded in the office of the clerk of the county of \_\_\_\_\_ aforesaid, in book 10 of mortgages, at page 19, on the tenth day of July, A. D., 1860], is fully paid, satisfied, and discharged. Dated the first day of July, 1860. A B.

In presence of E. B. K.

County, ss:

On this \_\_\_\_\_ day of \_\_\_\_\_, in the year one thousand eight hundred and sixty, before me personally came A. B., to me personally known to be the individual described in, and who executed the above certificate, and acknowledged that he ex-

ecuted the same freely and voluntarily for the uses and purposes therein mentioned.

In witness whereof, I have hereto set my hand and official seal, the day and year in this certificate first above written.

L. M. [L. s.], Notary Public.

*Satisfaction by an Executor, Administrator or Trustee.*

I, A. B., executor of the last will and testament of C. D., deceased, [or, administrator of the estate of C. D., deceased; or, trustee of the estate of C. D., &c.,] do hereby certify that a mortgage made and executed by E. F., to the said C. D., in his lifetime, [or, to me as such trustee as aforesaid,] bearing date, &c. [Follow the preceding forms, as the case may require.] A. B.

In presence of

E. B. K.

*Satisfaction of Judgment in a Justice's Court, where a Transcript is filed in the County Clerk's Office.*

State of California, }  
County of Sutter, } ss:

County Clerk's Office.

A. B. } Judgment rendered in favor of the plaintiff against  
against } defendant, before E. F., Esq., a Justice of the Peace  
C. D. } in and for said county, for            dollars and  
cents, damages and costs.

Transcript filed in this office and judgment docketed the day of           , in the year 1859, in the county court of this county.

Satisfaction of the above mentioned judgment is hereby acknowledged. A. B.

County of Sutter, ss:

I hereby certify that on this            day of           , 1859, before me personally came the above named A. B., [&c., the usual form of acknowledgment. See § 208 Practice Act.]

*Satisfaction of Judgment in a Court of Record.<sup>1</sup>*

State of California, District Court of the }  
10th Judicial District—County of   . }

A. B. } Of the            day of January, one thousand eight  
against } hundred and fifty-nine.  
C. D. } Satisfaction for \$

Satisfaction is acknowledged between A. B., plaintiff, and C.

<sup>1</sup> Satisfaction of judgment in courts of record may be acknowledged by the attorney within one year after filing the record. Wood's Dig. art. 140, 942.

D., defendant, for        dollars. Judgment docketed the tenth day of January, one thousand eight hundred and fifty-nine, in the office of the clerk of said court.

[For certificate see preceding form.]

*Application for a Subpœna to compel a subscribing Witness to attend before an officer, to prove the Execution of a Conveyance.*

To G. H., Esq., notary public [or other officer authorized to take acknowledgments] of        county:

I, A. B., do hereby make application to you to issue a subpœna, requiring E. F., who resides in the town of        in said county, to appear and testify before you, touching the execution of a certain conveyance of real estate, made and executed by I. J., to me, the said A. B., [or, if the application is made by the heir, or personal representative of the grantee, name such grantee,] and to which the said E. F. is a subscribing witness; the said E. F., having refused, upon my request, to appear and testify touching the execution of the said conveyance; and the same not having been proved or acknowledged, cannot be so proved or acknowledged without the evidence of the said E. F. Dated the first day of July, 1859.

A. B.

County, ss:

A. B. the applicant above named, being duly sworn, says that the facts stated and set forth in the above application are true.

A. B.

Sworn to before me, this first day of July, 1859,

G. H., Notary Public.

*Form of the Subpœna.*

State of California, }  
County, } ss:

To E. F., of the town of        in said county:

In the name of the people of the state of California, you are hereby commanded to appear before me, at my office [or, dwelling-house], in the town of       , in said county, on the        day of July, instant, at ten o'clock in the forenoon, then and there to testify, touching the execution of a conveyance of real estate, from K. B. to A. B., to which you are a subscribing witness, as appears by the application of the said A. B. to me made under oath. Hereof fail not at your peril. Given under my hand, this first day of March, 1860.

P. Q. R.

Notary Public.

*Affidavit to obtain Warrant, to be endorsed on the original Subpoena.*

State of California, }  
County, } ss:

C. T., of \_\_\_\_\_, being duly sworn, says, that on the fifth day of May, instant, at the town of \_\_\_\_\_, in said county, he served the within subpoena on E. F., therein named, personally, by then and there showing him the same, and delivering to him a true copy thereof, and by paying [or, tendering] to him the sum of \_\_\_\_\_ for his fees for travelling to the place specified in the said subpoena, and for his attendance in pursuance thereof, and his reasonable expenses. C. T.

Sworn to before me, this \_\_\_\_\_ day of \_\_\_\_\_, &c.  
P. Q. R., Notary Public.

*Warrant against Witness.*

State of California, }  
County, } ss:

To the sheriff of said county, greeting:

In the name of the people of the state of California, you are hereby commanded forthwith to apprehend E. F., in your county, and bring him before me, O. P., Esq., county judge of said county, at my chambers, at the court house in the town of \_\_\_\_\_, in said county, to testify touching the execution of a conveyance of real estate, from K. B. to C. T., to which the said E. F. is a subscribing witness, as is said; the said E. F. having been duly subpoenaed to appear before P. Q. R., a notary public, to testify touching the execution of the said conveyance, and having, without reasonable cause, neglected [or, refused] to attend in pursuance thereof. O. P.,

July, 1859. County Judge of \_\_\_\_\_ county.

*Commitment for Refusal to Testify.*

The people of the state of California to A. P., sheriff of the said county, greeting:

E. F. having this day been brought before me, on a warrant by me issued to compel his attendance to testify [where the witness appears in pursuance of the subpoena, say: having this day appeared before me, in pursuance of a subpoena by me issued, requiring him to appear and testify] touching the execution of a conveyance of real estate, from K. B. to C. T., to which the said E. F. is a subscribing witness, as is said; and the said E. F., although required by me, having refused to answer upon oath [if the commitment is made on account of the refusal of the witness



*to answer a particular question, deemed pertinent by the officer, insert here: the following question, &c., specifying it particularly]* touching the execution of the said conveyance. You are therefore commanded forthwith to convey the said E. F. to the jail of the said county, and there commit him to close custody in such jail, without bail, until he shall submit to answer on oath as aforesaid [*or, the question aforesaid*], or be discharged according to law.

July, 1859.

County Judge of

O. P.,  
county.

*Oath to be administered to a Subscribing Witness.*

You do solemnly swear, that you will true answers make, to such questions as shall be put to you, touching the execution of this deed: So help you God: [*or, You do swear in presence of the ever-living God, that, &c., as above, omitting the words: So help you God: or, You do solemnly, sincerely, and truly affirm and declare, that, &c., as above, omitting the words as aforesaid.*]

*Oath to a Witness proving the Identity of the Parties, or of the Subscribing Witness, to a Conveyance.*

You do solemnly swear, that you will true answers make to such questions as shall be put to you, touching the identity of the parties [*or, the subscribing witness*] to this conveyance. So help you God. [*If necessary, vary as in the foregoing form.*]

*Oath to a Deponent.*

You do solemnly swear, that the contents of this affidavit, by you subscribed, are true. So help you God. [*Vary as above when necessary.*]

## CHAPTER III.

## APPRENTICES, CLERKS, AND SERVANTS.

## STATUTORY PROVISIONS.

EVERY male infant, and every unmarried female under the age of eighteen years, with the consent of the persons or officers hereinafter mentioned, may, of his or her own free-will, bind himself, or herself, in writing, to serve as clerk, apprentice, or servant, in any profession, trade, or employment; if a male, until the age of twenty-one years, and if a female, until the age of eighteen years, or for any shorter time; such binding will be as valid and effectual as if the infant were of full age at the time of making the engagement.<sup>1</sup>

Such consent must be given:

1. By the father of the infant. If he be dead, or be not in a legal capacity to give his consent, or if he shall have abandoned and neglected to provide for his family, and such fact be certified by a justice of the peace of the township or county, or sworn to by a credible witness, and such certificate or affidavit be endorsed on the indenture, then,

2. By the mother. If the mother be dead, or be not in a legal capacity to give such consent or refusal, then,

3. By the guardian of such infant duly appointed. If such infant have no parent living, or none in a legal capacity to give consent, and there be no guardian, then,

4. By the supervisors of the county, or any two justices of the peace, or the judge of the Probate Court of the county.

Such consent must be signified in writing by the person entitled to give the same, by a certificate at the end of or endorsed upon the indentures, and not otherwise.

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<sup>1</sup> Statutes 1858, p. 184.

The executors of any last will of a parent, who shall be directed in such will to bring up his or her child to some trade or calling, may bind such child to service, as a clerk or apprentice, in like manner as the father might have done if living. The supervisors of the county may bind out any child under the ages above specified, who is or shall become chargeable to such county, to be clerks, apprentices, or servants. The child of a parent or parents chargeable to a town or city may be bound out by the presiding officer of the first council or legislative board, or any public officer or officers appointed to provide for the poor.

In San Francisco, the board of managers of the Industrial School may bind out the children of the institution.

The age of every infant bound as aforesaid, must be inserted in the indenture, and will be taken to be the true age, without further proof thereof; and public officers who act in such cases, are required to inform themselves fully of the infant's age. Every sum of money paid, or agreed for, with or in relation to the binding out of any clerk, apprentice, or servant, must also be inserted in the indenture.

The person to whom the child may be bound must enter into an agreement to be inserted in the indentures, that he will cause such child to be instructed to read and write, and to be also instructed in the general rules of arithmetic. The counterpart of any indentures executed by any county, city, or town officers, must be deposited in the office of the clerk of their county, city, or town.

Any white person, capable of becoming a citizen of this state, coming from any other country, state, or territory, may bind himself, or herself, to service, if an infant, until majority, or for any shorter term. Such contract of service, if made for the purpose of raising the passage-money, may be for the term of one year, although such term may extend beyond the time when he will be of full age; but shall in no case be for a longer term. No contract made as aforesaid will bind the servant, unless it be acknowledged by him or her before some public magistrate, or other officer authorized to administer oaths; nor unless a certificate of such acknowledgment, and that the same was made freely, on a private examination, be endorsed thereupon.

Indians having one-half or more Indian blood cannot be apprenticed.

No indenture, or contract for the service of any apprentice is valid, as against the person whose services may be claimed, unless made in the manner above prescribed.

The master is entitled to all the earnings of the apprentice.

A guardian is liable although the apprentice has gone off and left his master.

Our laws recognize no general authority in a father to dispose of his children, except for some specific and temporary purpose, such as apprenticeship during the father's life, or guardianship after his death.

Such indentures of apprenticeship may be annulled and declared void by any district court, or a judge thereof, or by a county court, or a judge of such court, in the county where the master, or person to whom such apprentice is bound, shall reside, upon satisfactory proof of either of the following named causes:

*First*—Fraud in the contract of indenture.

*Second*—When such contract is not made or executed in accordance with the provisions of this act.

*Third*—For wilful non-fulfilment, by such master, of the provisions of such indenture.

*Fourth*—Cruelty or maltreatment of such apprentice, by the master, without just cause or provocation.

And in such case an account may be taken and adjusted by such court or judge for any services rendered by the apprentice for the master under the articles of such indenture; and, in case such indenture shall be annulled, judgment may be given for such sum as may be found equitably due the apprentice, on account of any services so performed by him for such master.

For the purpose of annulling such contract of apprenticeship, and recovering for services as aforesaid, application shall be made, either in term-time or vacation, by such apprentice, or on his behalf, but always in his name; which application shall be made by petition, verified by oath, stating the grounds on which such application is made, the amount claimed, if any, for such services, and praying for the relief demanded. Such petition shall be filed with the clerk of the court, who shall immediately issue a citation thereon, duly certified, stating the grounds of

such application as set forth in the petition, and the relief sought thereby. The citation shall also designate the time and place for the hearing of the application, and shall be directed to such master, and shall require him to appear and answer such petition, at the time and place so designated, or in default thereof proof thereon will be heard in his absence, and such judgment as the right of the case will be rendered upon such petition; such citation shall be served at least five days before the day appointed therein for the hearing as aforesaid, by such person or officer (in the same manner and with the like effect) as is authorized to serve summons in civil cases in courts of record. And on the day appointed for the hearing of the petition, such master may file his answer in writing, verified like the petition, setting forth any just cause why the prayer of the petitioner should not be granted; and upon such pleadings, the court, or judge in term-time or vacation, shall hear the proofs of the parties, who shall be styled plaintiff and defendant as in civil cases, in the same manner, and shall determine the case in all respects as chancery cases are tried and decided under the civil practice act, and may annul such indentures, and grant any remedy or relief provided in this act, either with or without costs. But no adjournment or continuance of the case shall be granted, for any cause, for a longer period than ten days for any one time, and the decision of such court or judge shall be final.<sup>1</sup>

Any person held to service under the provisions of this act, and unlawfully departing and absenting himself or herself therefrom, upon the application of the master or mistress of such person, under oath, in writing, to the county judge of the county, that such person has absented himself or herself without permission, the judge may issue a writ reciting the substance of the affidavit, and commanding that such person be brought before him; the writ may be served by any officer authorized to make arrests, and if, upon the person being brought before him, and upon an examination of the matter, he is satisfied that such person is legally held to service, and has absented himself or herself without just cause, he shall order the person held to service to return to the care and custody of the person lawfully entitled

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<sup>1</sup> Laws 1858, pp. 185, 186.

to such service or labor. If such person persist in refusing to return, or returning, immediately absent himself or herself without leave, such judge may order such person held to service to be confined in the county jail, station house, or house of refuge, for such time as he may deem proper, not to exceed one month; or, at the instance of the master or mistress, may annul the indentures.<sup>1</sup>

Any person who shall aid, or assist, or encourage any person to run away, or harbor or conceal any person held to labor, knowing the same to be absent without leave of the master or mistress, shall be deemed guilty of a misdemeanor, and on conviction thereof, shall be fined in any sum not exceeding one hundred dollars.\*

Whenever any insane person shall have any claim for lands derived from Spanish or Mexican authorities, and such claim shall have been rejected by the commissioners to ascertain and settle private land claims in the state of California, the guardian of such insane person, appointed or to be appointed, by the Probate Court or judge, shall have power to employ counsel on behalf of such insane person, and on such terms as he may deem to be the best interest of his ward, to prosecute such claim on appeal before the District Court, or the Supreme Court of the United States, and for that purpose he may sell and convey such portion of the land so claimed as may be necessary therefor, and to meet any necessary expenses that may be incurred in the prosecution of such claim. The deed of conveyance by the guardian shall be approved by the district judge of the district in which the land is situated, by his approval in writing endorsed thereon, and shall be effectual to pass the estate of the said insane person in and to the land so conveyed; *provided*, that any contract so made with counsel for the prosecution of any such appeal, shall be first approved by the judge of the District Court of the district in which the land lies, upon petition duly presented for that purpose by the guardian; *and provided, further*, no sale of land, for the purpose aforesaid, shall take place, without a similar approval by the District Court aforesaid, upon a like petition of the guardian.\*

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<sup>1</sup> Laws 1858, pp. 183, 184.

\* *Id.*

\* *Id.*

Any person having or hereafter obtaining a minor Indian, male or female, from the parents or relations of such Indian minor, and wishing to keep it, such person shall go before a justice of the peace in his township, with the parents or friends of the child, and if the justice of the peace becomes satisfied that no compulsory means have been used to obtain the child from its parents or friends, shall enter on record, in a book kept for that purpose, the sex and probable age of the child, and shall give to such person a certificate, authorizing him or her to have the care, custody, control and earnings of such minor, until he or she obtain the age of majority. Every male Indian shall be deemed to have attained majority at eighteen, and the female at fifteen years.<sup>1</sup>

Any person having a minor Indian in his care, as described in the foregoing section of this act, and shall neglect to clothe and suitably feed such minor Indian, or shall inhumanly treat him or her, on conviction thereof shall be subject to a fine not less than ten dollars, at the discretion of a court or jury; and the justice of the peace, in his discretion, may place the minor Indian in the care of some other person, giving him the same rights and liabilities that the former master of said minor was entitled and subject to.<sup>2</sup>

Any person wishing to hire an Indian, shall go before a justice of the peace with the Indian, and make such contract as the justice may approve, and the justice shall file such contract in writing in his office, and all contracts so made shall be binding between the parties; but no contract between a white man and Indian, for labor, shall otherwise be obligatory on the part of an Indian.<sup>3</sup>

Complaints may be made before a justice of the peace, by white men or Indians, and in all cases arising under this act, Indians shall be competent witnesses, their credibility being left with the jury.—[Am. April 28, 1855; R. S. St. 1850, 409; C. L. 823.]<sup>4</sup>

If any person forcibly conveys any Indian from his home, or compels him to work, or perform any service against his will, in

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<sup>1</sup> Wood's Dig. art. 2648-2646.

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

this state, except as provided in this act, he or they shall, on conviction, be fined in any sum not less than fifty dollars, at the discretion of the court or jury.<sup>1</sup>

When an Indian is convicted of an offence before a justice of the peace punishable by fine, any white person may, by consent of the justice, give bond for said Indian, conditioned for the payment of said fine and costs, and in such case the Indian shall be compelled to work for the person so bailing, until he has discharged or cancelled the fine assessed against him; *provided*, the person bailing shall treat the Indian humanely, and clothe and feed him properly; the allowance given for such labor shall be fixed by the court, when the bond is taken.<sup>2</sup>

It is provided by section 20th of the act relating to Indians, 'that an Indian convicted of vagrancy may be hired out to service to the best bidder, after public notice, for any term not exceeding four months.'

#### OREGON.

In *Oregon* children under fourteen, are bound, only till that age, by the father; or in case of his death or incompetency, or if illegitimate, by the mother (while unmarried), or legal guardian; or if there be none such to act, then by themselves with the approbation of the probate judge, to be endorsed on both parts of the indenture. If above fourteen, they are bound in the same manner, males until twenty-one, and females until eighteen, or marriage within that age, but only upon their consent. The indentures to be in duplicate, signed and sealed; and in all cases where approved by the probate judge, or made with county commissioners, one part must be deposited with the probate judge.<sup>3</sup>

The county commissioners may bind out the children of parents, or children actually chargeable to the county; whether under or over fourteen, till the ages mentioned in the foregoing section; and provision shall be made in the contract, for teaching such children to read, write and cipher; and for such other instruc-

<sup>1</sup> Wood's Dig. art. 2643-2646.

<sup>2</sup> id. 2654.

<sup>3</sup> id. 2657.

<sup>4</sup> Statutes O. 397-400.



tion, benefit and allowance, either within or at the end of the term, as the county commissioners may think reasonable.

All considerations of money, or other things paid or allowed by the master, in the contract, must be paid or secured to the sole use of the minor.<sup>1</sup>

It is the duty of the parents, or other party approving the indenture, to inquire into the treatment of the apprentice, and prosecute the master or mistress in the Probate Court, for cruelty, neglect or breach of covenant; and upon the hearing the court may annul the indenture.

Action may also be brought in the District Court, by or on behalf of the apprentice or servant, for damages, on a breach of the contract; and on such action the minor may also be discharged from the service, and may thereupon be bound anew.<sup>2</sup>

If the minor unlawfully depart from the service of the master, upon complaint on oath he may be brought before a justice, by warrant, and returned to the master, or committed to the county jail.<sup>3</sup>

If he be guilty of gross misbehavior, or of wilful neglect, or refusal to do his duty, on application to the Probate Court, the master may be discharged from the contract; the apprentice or his guardian or parent being liable for the costs.

The death of the master or mistress concludes the contract, and the minor may be bound out anew.<sup>4</sup>

#### WASHINGTON.

The statutes of *Washington* do not make provision for apprentices, further than that in the poor-laws, it is provided that if a minor is likely to become chargeable to the county, it is the duty of the county commissioners to bind such minor as an apprentice, to some respectable householder of the county by written indenture.<sup>5</sup>

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<sup>1</sup> Statutes O. 397-406.

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> Laws Wash. 396.

## FORMS.

*Apprentice's Indenture.*

This indenture witnesseth: That James Knox, of the city of Marysville, in the county of Yuba, and state of California, now aged fifteen years, by and with the consent of John Knox, his father [*or, mother, his father being dead, or, being legally incapacitated, or, having abandoned or neglected to provide for his family*] endorsed upon this indenture, hath voluntarily, and of his own free-will and accord, put and bound himself apprentice to Henry Jones, of the city of San Francisco, to learn the art, trade and mystery of a baker; and as an apprentice to serve from this date, for, and during, and until the full end and term of four years next ensuing, [*or, until the said James Knox shall have attained the age of twenty-one years, which will be on the day of                   , in the year 18    ,*] during all which time the said apprentice shall serve his master faithfully, honestly, and industriously; his secrets keep, and lawful commands everywhere readily obey; at all times protect and preserve the goods and property of his said master, and not suffer or allow any to be injured or wasted. He shall not buy, sell, or traffic, with his own goods, or the goods of others, nor be absent from his said master's service, day or night, without leave; but in all things behave himself as a faithful apprentice ought to do, during the said term. And the said master shall clothe and provide for the said apprentice in sickness and in health, and supply him with suitable food and clothing; and shall use and employ the utmost of his endeavors to teach, or cause him, the said apprentice, to be taught or instructed, in the art, trade, or mystery of a baker; and also cause the said apprentice, within such term, to be instructed to read and write, and to be taught in the general rules of arithmetic, or in lieu thereof, that he will send the said James Knox to school, three months of each year of the period of this indenture. [*If necessary, insert here: And the said Henry Jones acknowledges that he has received, with the said James Knox from John Knox his father, [*or, mother,*] the sum of                   dollars, as a compensation for his instruction, as above mentioned; or: And the said Henry Jones further agrees to pay to the said James Knox the following sums of money, viz.: for the first year of his service                   dollars per month; for the second year of his service                   dollars per month; and for every subsequent year, until the expiration of his term of service,                   dollars per month; which said payments are to be made on the first day of each month in each year.*]

And for the true performance of all and singular the covenants

and agreements aforesaid, the said parties bind themselves, each unto the other, firmly by these presents.

In witness whereof, the parties aforesaid have hereunto set their hands and seals, the fifth day of May, in the year one thousand eight hundred and sixty.

Signed sealed and delivered in  
presence of WILLIAM DORAN.

JAMES KNOX. [L. S.]  
HENRY JONES. [L. S.]

*Consent of Father or Mother.*

I, John Knox, father of the within named James Knox, a minor, do hereby consent to, and approve of, the binding of my son the said James Knox, as in the above [or, within] indenture mentioned. Dated the 5th day of May, in the year 1860.

JOHN KNOX.

*Justice's Certificate, where Mother gives Consent.*

I, B. C., a justice of the peace of the city and county of San Francisco, do certify, that the father of the infant named in the within indenture, is dead, [or, is not in legal capacity to give his consent thereto; or, has abandoned and neglected to provide for his family.] Dated the            day of            , 1860.

B. C., Justice of the Peace.

*Consent of Guardian.*

I, C. G. Bryant, the guardian, duly appointed, of Geo. Bruce, in the within indenture named, do certify, that the father and mother of the said Geo. Bruce are dead, [or, that the father of the said Geo. Bruce is dead, and that the mother of the said Geo. Bruce is not in legal capacity to give her consent to the said indenture of apprenticeship;] and that I do hereby consent, as his guardian, that he, the said Geo. Bruce, may bind himself in and by the said indenture.

Dated the first day of May, 1859.

C. G. BRYANT, guardian of the said Geo. Bruce, a minor.

*Certificate of Consent of the Supervisors of the County, two Justices of the Peace of the County, or Judge of the Probate Court of the County in which the Infant resides.*

We, the undersigned, the supervisors of the county of            by A. B. their president, duly authorized by us to sign for us [or, two justices of the peace of the county of            ; or, I, the undersigned, the probate judge of the court of            county,] where the within named G. B. resides, do certify, that the said

G. B. has no parent living, [or, no parent in legal capacity to give consent to the within indenture; or, no father living, and his mother is not in legal capacity to give consent to the within indenture,] and that he has no guardian, and that we, the said supervisors [or, justices; or, I the said judge], do consent that the said C. D. may bind himself in and by the said indenture.

Dated May 1, 1859.

The supervisors of the county of \_\_\_\_\_ by A. B., their president.  
 \_\_\_\_\_ Or, C. D., Justice, &c., E. F., Justice, &c.  
 \_\_\_\_\_ Or, G. H., Probate Judge.

*Agreement of the Father where he becomes responsible for the Apprentice.*

This indenture, made the \_\_\_\_\_ day of \_\_\_\_\_, in the year one thousand eight hundred and \_\_\_\_\_, between E B K, of, &c., and M M B, of, &c., witnesseth: That the said E B K, in consideration of the covenant and agreement hereinafter mentioned, doth, by these presents, put and bind his son, E M P, to the said M M B, to learn the art, trade, and mystery of a baker, and as an apprentice to serve from this date, for, and during, and until the full end and term of five years next ensuing, to the best of his power and skill, faithfully and honestly, in all lawful business and matters that the said M M B may direct; and the said E B K doth hereby covenant and agree with the said M M B, that the said E M P shall in all things well and truly serve the said M M B during the said term, according to the conditions of the indenture this day executed by the said E M P and M M B, with my written consent thereupon endorsed; and the said M M B doth covenant and agree with the said E M P, to pay to the said E M P the sum of \_\_\_\_\_ dollars, on the first day of each and every month during the term aforesaid.

In witness whereof, the said parties to these presents have hereunto set their hands and seals, the day and year first above written.

Sealed and delivered in presence of C M D.

E B K. [L. s.]  
 M M B. [L. s.]

*The Same, Endorsed upon the Indenture.*

In consideration of the covenants and agreements to be performed by M M B to and with my son, E M P, specified and contained in the within indenture, I do hereby bind myself to the said M M B, for the true and faithful performance and observance, by the said E M P, of the matters and things by him to be performed and observed in and by the said indenture; and

I do hereby covenant to and with the said M M B, that the said E M P shall, in all things, well and truly perform and observe the same.

In witness whereof, I have hereunto put my hand and seal, the day of, &c.

In presence of C M D.

E B K. [L. s.]

*Servant's Indenture.*

This indenture witnesseth: That Mary Flynn, of the town of, &c., now aged twelve years, by and with the consent of A. Flynn, of the town aforesaid, her father, [*or*, mother, &c.,] has voluntarily and of her own accord, hired and bound herself to Aaron Johnson, as a domestic servant, to serve from the date hereof, for and until the full end and term of six years next ensuing; [*or*, until she shall have attained the age of eighteen years, which will be on the day of , 18 ;] during all which time the said servant shall serve her master faithfully, honestly, and industriously; all lawful commands everywhere readily obey; and protect and preserve the goods and property of her said master, and not suffer or allow any to be injured or wasted: she shall not be absent from service without leave; and in all things, and at all times, shall behave as a faithful servant ought to do. And the said Aaron Johnson shall and will furnish and provide the said servant, during the continuance of the said term, with suitable and sufficient food and clothing, and cause her, within the said term, to be instructed to read and write, and to be taught the general rules of arithmetic, or, in lieu thereof, that he will send said Mary Flynn to school three months of each year of the period of this indenture, and will pay to her monthly during her term of service, on the first day of each month the sum of dollars; and for the true performance of all and singular the covenants and agreements aforesaid, the said parties bind themselves, each unto the other, firmly by these presents.

In witness, &c., [*signed by the parties, and endorsed with the consent of father, or mother, or guardian, as the case may be.*]

*Contract of Service by a Minor coming from another Country or State, and Acknowledgment.<sup>1</sup>*

This indenture, made the day of, &c., between C B, an infant under the age of twenty-one years, to wit, of the age of seventeen years, on the day of last, coming from the county of Cork, in Ireland, a foreign country beyond sea, and

<sup>1</sup> The execution of the contract should be acknowledged before a public magistrate or other officer authorized to administer oaths.

E. F., of Crescent City, California, witnesseth: That the said C. B., in pursuance of the statute in such case made, and in consideration of the covenants hereinafter contained, binds himself to serve the said E. F., from the day of the date hereof, until the full end and term of four years; [or, until the said C. B. shall be twenty-one years of age, which will be on the      day of      in the year      ]; during which term the said C. B. shall well and faithfully serve the said E. F. and his assigns, in all such lawful business as he shall be put to by the said E. F. or his assigns, to the utmost of the power and ability of the said C. B., and at all times behave himself honestly and obediently to the said E. F. and his assigns. And the said E. F. covenants on his part, and agrees to and with the said C. B., that he, the said E. F., will find and allow to the said C. B. suitable and sufficient food and clothing, and all other necessities during the said term.

In witness whereof, the parties have hereto set their hands and seals, the day and year above written.

C. B. [L. s.]  
E. F. [L. s.]

State of California, }  
Del Norte County, } ss:

On the      day of      , in the year      , personally came before me, C. B., to me known to be the person who executed the within contract, and on a private examination before me, acknowledged that the said contract was made and executed by him freely, for the purposes therein mentioned.

E. MASON, Justice of the Peace.

*Complaint by Master against Apprentice for Absenting Himself.*

To T. S. Pomeroy, Esquire, the county judge of the county of Del Norte:

I, E F, of the town of Crescent city, in said county, tinner, hereby make complaint to you, that C B, an apprentice lawfully bound to serve me, the said E F, whose term of service is still unexpired, has unlawfully departed and absented himself from said service without permission, and neglects to serve me, as by law and the terms of his indenture of apprenticeship he is required.

E. F.

Dated the      day of      , 1860.

Del Norte County, ss:

E F, the above named complainant, being duly sworn, deposes and says, that the facts and circumstances stated and set forth in the said complaint are true.

E. F.

Sworn to before me, this      day of      , 1860.

E. MASON, Justice of the Peace.

*Warrant on the foregoing Complaint.*

State of California, }  
Del Norte County, } ss :

The people of the state of California to the sheriff or any constable or police officer of said county, greeting :

Complaint has been made to me, T. S. Pomeroy, county judge of said county, upon the oath of E F, of , in said county, tinner, that C B, an apprentice lawfully bound to serve the said E F, whose term of service is still unexpired, has unlawfully departed and absented himself from said service without permission, and neglects to serve the said E F, as by law and the terms of his indenture of apprenticeship he is required : Now, therefore, you are hereby commanded forthwith to apprehend the said C B, and bring him before me, at my chambers, in Crescent City, to answer to the said E F and be dealt with according to law.

Given under my hand, this      day of      , 1860.

T. S. POMEROY, County Judge of Del Norte County.

*Commitment of an Apprentice absenting Himself without Permission.*

State of California, }  
Del Norte County, } ss :

The people of the state of California to the sheriff or any constable or police officer of said county, greeting :

Complaint on oath was made to me the undersigned, T. S. Pomeroy, county judge of said county, by E F, of , in said county, tinner, that C B, an apprentice lawfully bound to serve the said E F, whose term of service was still unexpired, has unlawfully [&c., as in the foregoing] to serve the said E F, as by law and the terms of his indenture of apprenticeship he was required : And the said C B, by virtue of my warrant thereupon issued, has been brought before me to be dealt with according to law ; and whereas, upon an examination of the matter, I was satisfied that said C B is legally held to service as an apprentice to E F, tinner, by lawful indenture, and that his term of service has not yet expired, and has absented himself from such service without permission and without just cause, and ordered the said C B to return to the care and custody of said E F, and said C B refusing to return as ordered : Now, therefore, you are hereby commanded to take and convey the said C B to the county jail of said county, and deliver him to the keeper thereof, who is commanded to receive the said C B into the said common jail, there to remain for the period of one month.

Given, &c., [as above.]

*Discharge of the Apprentice from Service, and the Master from his Obligations.*

Fresno County, ss :

Complaint on oath was made to me, &c., [as above, then add:] Now, therefore, I do hereby discharge the said C B from the service of the said E F, and the said E F from all and every of his obligations incurred under and by virtue of the indentures of apprenticeship of the said C B.

Given, &c., [as above.]

*Petition by Apprentice to District or County Court, or a Judge of such Court, for Relief and to annul Indentures.*

In the matter of the application of A B, }  
an apprentice for relief, &c. : }

To the honorable the county court of the county of Los Angeles, state of California :

The petition of A B [or of E F, for and on behalf of the said A B] respectfully sheweth :

That the said A B was bound to service to G H, by indenture of apprenticeship, signed and executed by both parties on the day of \_\_\_\_\_, 1858, in the trade or occupation of wine-making, and immediately, thereupon, entered into such service, and has so continued to this time. That by the terms of said indenture, said G H agreed to pay to said A B the sum of five dollars monthly. That said G H has wholly neglected and refused to pay to said A B the said sum of five dollars per month, or any part thereof. That the services of said A B, rendered to said G H, are worth the sum of ten dollars per month, and that upon a fair accounting, the sum of twenty-five dollars is now due to him, the said A B, from the said G H. That said G H has been guilty of cruelty and maltreatment toward said A B, without just cause or provocation. That among other acts of cruelty and maltreatment, said G H has compelled the said A B to sleep in the vineyard of said G H, without any provision for extra covering, and has beaten and bruised said A B with hoes, rakes, spades, and other implements and weapons, without just cause or provocation. That the said A B has performed all the conditions of said indenture, upon his part, and performed all the services and duties to which he was lawfully and rightfully bound as such apprentice.

Wherefore, your petitioner prays that said indenture of apprenticeship may be annulled and declared void ; that an account may be taken and adjusted between the parties ; that said A B may have judgment against said G H for said sum of twenty-five dollars, and that said A B may have at your hands, all and



any additional other or different relief to which he may be entitled.  
A. B.

County of Los Angeles, ss:

A B, being duly sworn, says that he has read (or heard read) the foregoing petition, and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated on information or belief, and as to those matters he believes it to be true.  
A. B.

Sworn before me, February 1st, 1859.

WM. G. DRYDEN, Notary Public.

*Citation to Master on behalf of Apprentice.*

In the County Court of the County of Los Angeles.

A. B. }

vs. }

G. H. }

The people of the state of California send greeting: To G. H.

A. B. having filed in this court his petition, praying that his indenture of apprenticeship with you may be annulled, and that he recover the sum of twenty-five dollars due from you, and for general relief, on the ground of your refusal to pay him the amount agreed upon in said indenture, and of cruelty and maltreatment, the hearing of the same has been fixed for Monday the       day of       next, at ten o'clock in the forenoon, of that day, at the court room of this court, at the court-house in the city of Los Angeles, at which time and place you are cited to appear and answer the said petition, or in default thereof, proof therein will be heard in your absence; and such judgment as the right of the case demands will be rendered on said petition.

Given under my hand, and the seal of the county court of the county of Los Angeles, this       day of       in the year of our Lord one thousand eight hundred and fifty-nine.

CHARLES R. JOHNSON, [L. s.] Clerk.

*Certificate of Apprenticeship of an Indian Minor.*

State of California,       }  
City and County of San Francisco. } ss:

Before B. Carman, Justice of the Peace in and for the third township of said county.

In the matter of the care, custody and control, of "Mariposa," an Indian minor: }

Charles Cole, a resident of this city and county, having, this first day of June, 1859, appeared before me with the parents [or,

friends,] of a female minor Indian, named "Mariposa," which child he has obtained from the parents [*or*, relatives] of said minor, and having made application for authority to keep the said minor, and after a full examination of the matter, it appearing satisfactorily to me that no compulsory means have been used to obtain the child from its parents or friends, and it appearing that the age of said child, so far as can be ascertained, is under fifteen years [*if a male*, under eighteen years], to wit, if the age of ten years, and there appearing to me no valid objection to binding out said child to the said applicant, I do hereby certify that the said Charles Cole is authorized to have the care, custody, control and earnings of said minor "Mariposa," until she attain the age of fifteen years [*if a male*, eighteen years].

Witness my hand the first day of June, 1859.

B. CARMAN, Justice, &c.

*Order of a Justice transferring an Indian Minor to a new Master.*

State of California,  
City and County of San Francisco. } ss :

Before B. Carman, Justice of the Peace in and for the third township of said county.

In the matter of "Mariposa," an Indian minor.

Charles Cole, having been convicted on trial this day duly had before me, of neglecting to clothe and suitably feed [*or*, of inhumanly treating] "Mariposa," a female minor Indian, in his care, and it appearing to me, that he is not a proper person to have the care and control of said minor, I do hereby order and direct, that the said "Mariposa" be removed from the care, custody and control of said Charles Cole, and that she be placed in the care of Henry Thorn, a competent and suitable person, who is hereby authorized to have the care, custody, control and earnings of said "Mariposa" until she arrive at the age of majority.

Witness my hand this first day of August, 1859.

B. CARMAN, Justice, &c.

*Contract of Service by an Indian.*

This contract made between Paul Sampson, and Panoche, an Indian, sheweth :—

That said Panoche agrees to serve the said Sampson, for the period of five years, as a body-servant, to do and perform any and all services of every description that may be reasonably required of him by said Sampson, and in consideration thereof, the said Sampson agrees to feed and clothe the said Panoche, and furnish him with comfortable lodgings, during the said period to

pay him weekly the sum of one dollar, and at the end of his term of service, to wit, the first day of May, 1864, to pay to him the sum of three hundred dollars, and a new suit of clothes.

Witness our hands this first day of May, 1859.

PAUL SAMPSON.

In presence of

PANOCHÉ, X his mark.

LAWRENCE RYAN, Justice of the Peace.

City and County of San Francisco, ss:

I, Lawrence Ryan, justice of the peace of said county in and for the first township, certify that I approve of the foregoing contract of service, and I do hereby file the said contract in my office, as required by statute, this first day of May, 1859.

LAWRENCE RYAN, Justice, &c.

## CHAPTER IV.

## ARBITRATION.

Persons capable of contracting may, by agreement in writing, submit to arbitration any controversy which might be the subject of a civil action between them, except a question of title to real property in fee or for life. This qualification shall not include questions relating merely to the partition or boundaries of real property.<sup>1</sup>

It may be stipulated in the submission, that it be entered as an order of the District Court, for which purpose it shall be filed with the clerk of the county where the parties, or one of them, reside. The clerk shall thereupon enter in his register of actions a note of the submission, with the names of the parties, the names of the arbitrators, the date of the submission, when filed, and the time limited by the submission, if any, within which the award shall be made. When so entered, the submission shall not be revoked without the consent of both parties. The arbitrators may be compelled by the court to make an award, and the award may be enforced by the court in the same manner as a judgment. If the submission be not made an order of the court, it may be revoked at any time before the award is made.

Arbitrators shall have power to appoint a time and place for hearing, to adjourn from time to time, to administer oaths to witnesses, to hear the allegations and evidence of the parties, and to make an award thereon.<sup>1</sup>

All the arbitrators shall meet and act together during the investigation; but when met, a majority may determine any question. Before acting they shall be sworn before an officer authorized to administer oaths, faithfully and fairly to hear and examine the allegations and evidence of the parties in relation

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<sup>1</sup> Wood's Dig. art. 850-885.

to the matters in controversy, and to make a just award according to their understanding.<sup>1</sup>

The award shall be in writing, signed by the arbitrators, or a majority of them, and delivered to the parties. When the submission is made an order of the court, the award shall be filed with the clerk, and a note thereof made in his register. After the expiration of five days from the filing of the award, upon the application of a party, and on filing an affidavit, showing that notice of filing the award has been served on the adverse party or his attorney, at least four days prior to such application, and that no order staying the entry of judgment has been served, the award shall be entered by the clerk in his judgment book, and shall thereupon have the effect of a judgment.<sup>1</sup>

The court, on motion, may vacate the award upon either of the following grounds, and may order a new hearing before the same arbitrators, or not, in its discretion: 1. That it was procured by corruption or fraud. 2. That the arbitrators were guilty of misconduct, or committed gross error in refusing on cause shown to postpone the hearing, or in refusing to hear pertinent evidence, or otherwise acted improperly, in a manner by which the rights of the party were prejudiced. 3. That the arbitrators exceeded their powers in making their award; or that they refused, or improperly omitted to consider a part of the matters submitted to them; or that the award is indefinite, or cannot be performed.<sup>2</sup>

The court may, on motion, modify or correct the award, where it appears: 1. That there was a miscalculation in figures, upon which it was made, or that there is a mistake in the description of some person or property therein. 2. When a part of the award is upon matters not submitted, which part can be separated from other parts, and does not affect the decision on the matter submitted. 3. When the award, though imperfect in form, could have been amended if it had been a verdict, or the imperfection disregarded.<sup>3</sup>

The decision upon the motion shall be subject to appeal in the same manner as an order which is subject to appeal in a civil action, but the judgment entered before a motion is made shall not be subject to appeal.<sup>4</sup>

<sup>1</sup> Wood's Dig. art. 880-885.

<sup>2</sup> *Id.* 886-889.

If a submission to arbitration be revoked, and an action be brought therefor, the amount shall only be the costs and damages sustained in preparing for and attending the arbitration.<sup>1</sup>

#### JUDICIAL DECISIONS

The submission of a cause in court to arbitration operates as a discontinuance of the suit; a consent to submit a matter to arbitration does not imply a consent that the party in whose favor the award is made, may enter judgment upon it in court as a matter of course. The ordinary way of enforcing<sup>2</sup> an award is by action; and where no statute exists authorizing the court to enter judgment on an award upon motion, the court has no right to proceed in that way.<sup>3</sup>

Unless the statute is strictly complied with, a submission of a cause to arbitration amounts only to its withdrawal from the jurisdiction of the court, which loses all control over it, and has no authority to enter judgment upon the finding of the arbitrators, except by consent of parties.<sup>4</sup>

Our statute is but a reaffirmance of the common law, and gives to parties no higher rights than they might have asserted in a court of equity, in case of mistake, fraud, or accident. The arbitrators are not bound to decide on principles of strict law, but may decide on principles of equity and good conscience.<sup>5</sup>

If arbitrators intend to decide according to law, and mistake the law, the court will set aside their award.<sup>6</sup>

In all cases where the arbitrators give the reasons of their finding, they are supposed to have intended to decide according to law, and to refer the point for the opinion of the court. In such cases, if they mistake the law, the award must be set aside, for it is not the opinion they intended to give, the same having been made through mistake.<sup>7</sup>

Where parties refer all their differences to arbitration, it is the duty of the arbitrators to pass upon the whole subject in controversy, and if it appear upon the face of the award that they have not disposed of the whole matter, but have left a part open;

<sup>1</sup> Wood's Dig. art. 896-899.

<sup>2</sup> 1 Cal. 45.

<sup>3</sup> 4 Id. 1.

<sup>4</sup> Id. 205; 2 Id. 74.

<sup>5</sup> 2 Id. 74; Id. 122.

or, if the terms of the award be such as to render a further inquiry necessary to ascertain a sum of money to be paid, or some act to be done, it is void, and will be set aside. When arbitrators have published their award by delivering it to the parties as the award, any revision, correction, or alteration made by them, without the consent of the parties, will vitiate it.<sup>1</sup>

A stipulation in the submission that neither party should appeal, and a power of attorney to confess judgment pursuant to the award, will not bar an appeal from a judgment on the award, especially under our system, where law and equity are blended together.<sup>2</sup>

Contemplative, speculative and contingent profit, cannot be allowed as damages.<sup>3</sup>

An award to be effectual must be certain and conclusive, and all intendments must be in favor of giving it certainty. The court must lean to such construction as will support it, and the uncertainty, if any, must appear upon its face.<sup>4</sup>

Courts of equity will set aside awards for fraud, mistake, or accident, and it makes no difference whether the mistake be one of fact, or law.<sup>5</sup>

The award rendered upon a fair arbitration of the matters in dispute, and long concurred in, is conclusive of the rights of the parties.<sup>6</sup>

Where parties enter into a submission to arbitration, wherein it is stipulated that the award be entered, as the judgment of the county court, it is void, *in toto*, that court having no jurisdiction over the subject matter of the award.<sup>7</sup>

One partner cannot bind his copartner by submission of partnership matters to arbitration, but such submission would be good as against himself.<sup>8</sup>

A submission to arbitration cannot be entered as an order of the county court, from want of jurisdiction.<sup>9</sup>

When an arbitrator exceeds his authority, the effect of his act is void, whether done conscientiously or by mistake.<sup>10</sup>

<sup>1</sup> 7 Cal. 812.

<sup>2</sup> 2 id. 74.

<sup>3</sup> 1 id. 192.

<sup>4</sup> 2 id. 601.

<sup>5</sup> id. 74, 122.

<sup>6</sup> 5 id. 179.

<sup>7</sup> 9 id. 142.

<sup>8</sup> 5 id. 845.

<sup>9</sup> 9 id. 142.

<sup>10</sup> 6 Abbott, 28.

An award which leaves nothing to be done, to dispose of the whole matter in controversy, except mere ministerial acts, is sufficiently final and certain.<sup>1</sup>

By the constitution of California, tribunals of conciliation are authorized to be established, but no action has yet been had in the legislature on the subject; should such tribunals be established, they will be found to differ very slightly in character from our present courts of arbitration, and the forms used in the one can readily be adapted to the other.

#### OREGON.

The foregoing provisions apply substantially to *Oregon*, except so far as modified by the following sections of the statutes of that state on the subject. No statutory provision upon the subject of arbitration appears in the laws of *Washington Territory*.

All controversies which might be the subject of a personal action at law, or of a suit in equity, may be submitted to the decision of one or more arbitrators.<sup>2</sup>

No such submission shall be made respecting the claim of any person to any estate in fee or for life to any real estate, but any claim to an interest for a term of years, or for one year or less, in real estate, and controversies respecting the partition of lands between joint tenants, or tenants in common, or concerning the boundaries of lands, or concerning the admeasurement of dower, may be submitted to arbitration; but nothing in this chapter contained shall preclude the submission and arbitrament of controversies according to the common law.<sup>3</sup>

The parties may appear in person, or by their lawful agents or attorneys, before any justice of the peace or clerk of the District Court, and there sign and acknowledge an agreement in substance as follows :

Know all men that A. B., of \_\_\_\_\_, and C. D., of \_\_\_\_\_, have agreed to submit the demand, a statement whereof is hereto annexed [and all other demands between them, *as the case may be*], to the determination of \_\_\_\_\_, and \_\_\_\_\_; the award of whom, or

<sup>1</sup> 28 Barb. 187.

<sup>2</sup> Statutes O. 176.



the greater number of whom, being made and reported within \_\_\_\_\_ days from this date, to the District Court for the county of \_\_\_\_\_, shall be final; and if either of the parties shall neglect to appear before the arbitrators, after due notice given them of the time and place appointed for hearing, the other parties may proceed in his absence.

Dated this \_\_\_\_\_ day of \_\_\_\_\_, A. D., 185 \_\_\_\_\_  
A. B.  
C. D.

And the justice or clerk shall subjoin to the said agreement his certificate, in substance as follows :

State of Oregon, }  
County of \_\_\_\_\_, } ss.

Personally appeared before me, the above named A. B. and C. D., [or, personally appeared, the above named A. B., and the said C. D., by \_\_\_\_\_, his attorney, *as the case may be*], and acknowledged the above instrument, by them signed, to be their free act.

Dated this \_\_\_\_\_ day of \_\_\_\_\_ 185 \_\_\_\_\_  
J. P., Justice of the Peace.

If any specific demand be submitted to the exclusion of others, the demand submitted shall be set forth in the statement annexed to the agreement of submission, otherwise it shall not be necessary to annex any statement of a demand, and the words in the agreement relating to such statement may be omitted, and the submission may then be of all demands between the parties, or of all demands which either of them has against the other, or the submission may be varied in this respect, in any other manner, according to the agreement of the parties.<sup>1</sup>

The award shall be delivered by one of the arbitrators to the clerk of the District Court, designated in the agreement of submission, or shall be enclosed and sealed by them and transmitted to the clerk, and shall remain sealed, until opened by such clerk.<sup>1</sup>

The award may be returned at any term or session of the court, that shall be held within the time limited in the submission; and the parties shall attend at every such term or session, without any express notice for that purpose, in like manner as

<sup>1</sup> Statutes O. 177.

it an action for the same cause were pending between them in the same court; but the court may require actual notice to be given to either party, when it shall appear to them necessary or proper, before they proceed to act upon the award.<sup>1</sup>

Upon such award being confirmed or modified, the court shall render judgment in favor of the party to whom any sum of money or damages shall have been awarded, that he recover the same; and if the award shall have ordered any act to be done by either party, judgment shall be entered that such act be done according to such order. The costs of proceedings shall be taxed as in suits, and if no provision for the fees and expenses of the arbitrators shall have been made in the award, the court shall make a suitable allowance.<sup>1</sup>

A record of such judgment shall be made, commencing with a memorandum reciting the submission, then stating the hearing before the arbitrators, their award, the proceedings of the court thereupon, in modifying or confirming such award, and the judgment of the court for the recovery of the debt or damages awarded, or other act to be done, and that the parties perform the acts ordered by the award, and for the recovery of the costs allowed.<sup>2</sup>

Such record shall be filed and docketed as records of judgments in other cases; shall have the same force and effect in all respects; be subject to all the provisions of law in relation to judgments in actions, and may in like manner be moved and reversed by writ of error or appeal, and execution shall issue thereupon.<sup>3</sup>

If there be no provision in the submission concerning the costs of the proceedings, the arbitrators may make such award respecting the costs as they shall judge reasonable, including therein a compensation for their own services; but the court may reduce the sum charged for the compensation of the arbitrators, if it shall appear to them unreasonable.<sup>4</sup>

Where, by such judgment, any party shall be required to perform any act other than the payment of money, the court rendering such judgment shall enforce the same by rule; and the party refusing or neglecting to perform and execute such act, or

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<sup>1</sup> Statutes O. 178.

<sup>2</sup> Id. 179

any part thereof, shall be subject to all the penalties of contemning an order of such court.<sup>1</sup>

## FORMS.

*General Submission—short Form.*

We, the undersigned, mutually agree to submit and do hereby submit all our matters in difference, of every name or nature, to the award and decision of P. Q., R. S., and T. U., for them to hear and determine the same, and make their award in writing, on or before the fifth day of May next.

Witness our hands, this fourth day of March, 1860.

In presence of }  
C. M. D. }

E. B. K.  
M. M. B.

*General Submission.*

Whereas differences have for a long time existed, and are now existing and pending, between A. B., of, &c., and C. D., of, &c., in relation to divers subjects of controversy and dispute: Now, therefore, we, the undersigned A. B. and C. D., aforesaid, do hereby mutually covenant and agree, to and with each other, that P. Q., R. S., and T. U., of, &c., or any two of them, shall arbitrate, award, order, judge, and determine, of and concerning all and all manner of actions, cause and causes of actions, suits, controversies, claims, and demands whatsoever, now pending, existing, or held, by and between us, the said parties; and we do further mutually covenant and agree, to and with each other, that we will in all things faithfully observe keep and abide by the decision and award said arbitrators shall make in writing, on or before the day of A. D. 1860.

Witness our hands and seals this tenth day of August, 1859.

A. B. [L. s.]  
C. D. [L. s.]

*Special Submission.*

Whereas a controversy is now existing and pending, between A. B., of, &c., and C. D., of, &c., in relation to certain mining claims and quartz mills, made by and between the said parties, at the town of , aforesaid, on the day of last past: Now, therefore, we, the undersigned A. B. and C. D., aforesaid, do hereby submit the said controversy to the arbitrament of P. Q., R. S., and T. U., of, &c., or any two of them; and we do mutually covenant and agree, to and with each other,

<sup>1</sup> Statutes C. 179.

that the award to be made by the said arbitrators, or any two of them, shall, in all things, by us, and each of us, be well and faithfully kept and observed; provided, however, that the said award be made in writing, under the hands of the said P. Q., R. S., and T. U., or any two of them, and ready to be delivered to the said parties in difference, or such of them as shall desire the same, on the                      day of                      next.

Witness our hands, [*as in the foregoing.*]

### *Bond of Arbitration.*

Know all men by these presents, that I, A. B., of, &c., am held and firmly bound to C. D., of, &c., in the sum of \$500, lawful money of the United States, to be paid to the said C. D., or to his executors, administrators, or assigns, for which payment to be well and faithfully made, I bind myself, my heirs, executors, and administrators, firmly, by these presents. Sealed with my seal; dated the                      day of                      A. D. 1859.

The condition of this obligation is such, that if the above bounden A. B., his heirs, executors, and administrators, shall, and do, in all things, well and truly abide by, perform, fulfil and keep the award, order, arbitrament, and final determination of M. N., O. P., and Q. R., of, &c., arbitrators as well on the part and behalf of the above bounden A. B., as of the above-named C. D., to arbitrate, award, order, judge, and determine, of, and concerning all and all manner of action and actions, cause, and causes of actions, suits, bills, bonds, specialities, judgments, executions, quarrels, controversies, trespasses, damages, and demands whatsoever, at any time heretofore had, made, moved, brought, commenced, sued, prosecuted, done, suffered, committed, or depending by and between the said parties, so as the said award be made in writing, under the hands of the said M. N., O. P., and Q. R., or any two of them, and ready to be delivered to the said parties in difference, or such of them as shall desire the same, on or before the                      day of                      , then this obligation to be void, or else to remain in full force.

Sealed and delivered in presence of }  
Y. Z. }

A. B. [L. s.]  
C. D. [L. s.]

### *Condition of Bond on a Special Submission.*

The condition of the above obligation is such: That if the above bounden A. B. shall well and truly submit to the decision of M. N., O. P., and Q. R., named, selected, and chosen arbitrators, as well by and on the part and behalf of the said A. B., as of the said C. D., between whom a controversy exists, to hear all the proofs and allegations of the parties, of and concerning a cer-

tain mining claim made by and between them, at the town of \_\_\_\_\_, aforesaid, on the \_\_\_\_\_ day of, &c., and all matters relating thereto; so as the award be made, &c., [*as in the foregoing.*]

*Notice to Arbitrators of their Appointment.*

To P. Q.; R. S., and T. U., Esquires:

You are hereby notified, that you have been nominated and chosen arbitrators, as well on the part and behalf of the undersigned A. B., of, &c., as of C. D., of, &c., also undersigned, to arbitrate, award, &c. [*specifying the time within which, as stated in the submission or bond, the award must be made*]; and you are requested to meet the said parties at the office of Y. Z., in the town of Dry Creek, aforesaid, on the \_\_\_\_\_ day of, &c., at ten o'clock in the forenoon of that day, for the purpose of fixing upon a time and place when and where the proofs and allegations of the said parties shall be heard.

Dated the \_\_\_\_\_ day of, &c.

Yours, &c.,      A. B.  
C. D.

*Notice of Hearing.*

In the matter of an arbitration, of and concerning certain matters in difference between A. B. of the one part, and C. D. of the other part. }

Sir: You will please take notice that the arbitrators have appointed a hearing in the matter above specified, to be had before them, at the house of E. P., in the town of, &c., on the \_\_\_\_\_ day of, &c.

Dated the \_\_\_\_\_ day of, &c.

Yours, &c.,      A. B.  
Or, Y. Z., Attorney for A. B.  
To C. D.      Or, P. Q., R. S., and T. U., Arbitrators.

*Arbitrator's Oath.*

[*To be administered by any officer authorized to administer oaths.*]

You do severally swear, faithfully and fairly to hear and examine the matters in controversy between A. B., of the one part, and C. D., of the other part, and to make a just award according to the best of your understanding.

*Another Form, in writing.*

We, the undersigned, arbitrators, appointed by and between A. B. and C. D., do swear that we, respectively, will faithfully

and fairly hear and examine the allegations and evidence of the said parties in relation to the matters in controversy between them, and will make a just award therein, according to the best of our understanding.

P. Q.  
R. S.  
T. U.

Sworn to, this            day of            18    , before me,  
E. K., Justice of the Peace.

*Subpoena on Arbitration.*

County, } ss.  
The People of the State of California, to            , and            ,  
greeting:

We command you, and each of you, personally to appear and attend at the house of E. P., in the town of            , in said county, on the            day of            instant, at ten o'clock in the forenoon of that day, before P. Q., R. S., and T. U., arbitrators chosen to determine a controversy [*or*, certain matters in controversy], between A. B. and C. D., whereof the submission is on file in this court, then and there to testify in relation thereto, before said arbitrators, on the part of the said A. B. Hereof fail not at your peril.

Witness, Hon. Saml. B. McKee, Judge of the District Court of the 3d Judicial District in and for the county of Santa Clara, and the seal of said court, this            day of            1859.

J. B. HEWSON [L. s.], Clerk.

*Oath of Witness before Arbitrators.*

You do solemnly swear [*or affirm*] that the evidence you shall give to the arbitrators here present, on a controversy [*or*, on certain matters in controversy], between A. B. and C. D., shall be the truth, the whole truth, and nothing but the truth, so help you God.

*Revocation by both Parties.*

To P. Q., R. S., and T. U., Esquires:

Take notice, that we do hereby revoke your powers as arbitrators under the submission made to you by us in writing, and entered as an order of the fourth District Court [*or as the case may be*], on the            day of            , 18    .

A. B.  
C. D.

*Notice of Revocation by one Party (the Submission not having been entered as an Order of Court.)*

To C. D. :

mmmmmm

You are hereby notified, that I have this day revoked the powers of P. Q., R. S., and T. U., arbitrators chosen to settle the matters in controversy between us; and that the following is a copy of such revocation: [*Insert the revocation, made by one of the parties only.*]

Dated the       day of       , 1859.       Yours, &c., A. B.

*Award.*

In the matter of the arbitration of certain }  
matters in difference between A. B., on }  
the one part, and C. D., on the other. }

Know all men, that P. Q., R. S., T. U., to whom were submitted, as arbitrators, the matters in controversy existing between A. B., of, &c., and C. D., of, &c., as by their submission in writing, and bearing date the       day       , A. D. 18       , more fully appears: Now, having been first duly sworn according to law, and having heard the proofs and allegations of the parties, and examined the matters in controversy by them submitted, do make this award in writing; that is to say, the said C. D. shall make, execute, and deliver to the said A. B., on or before the       day of       instant, a good and sufficient assignment of a certain bond and mortgage executed, &c., to the said C. D., &c.; and the said A. B. shall pay, or cause to be paid, to the said C. D., the sum of       dollars, immediately upon the execution and delivery of the said assignment; [*or, the said C. D. shall pay, or cause to be paid, to the said A. B., the sum of       dollars, within ten days from the date hereof, in full payment, discharge, and satisfaction, of and for all moneys, debts, and demands, due, or owing from him, the said C. D., to the said A. B.; or, the said C. D. shall henceforth forever cease to prosecute a certain suit commenced by him, against the said A. B., in the District Court of, &c., now pending and undetermined in the said court; and the said A. B. shall pay, or cause to be paid, to the said C. D., on or before the       day of, &c., the sum of       dollars, in full satisfaction of the costs, charges, and expenses incurred by the said C. D., in and about the prosecution of his suit, as aforesaid.*] And we do further award, adjudge, and decree, that the said A. B. and C. D. shall, and do, within ten days next ensuing the date hereof, seal and execute unto each other, mutual and general releases of all actions, cause and causes of action, suits, controversies, claims, and demands whatsoever, for, or by reason of any matter, cause, or thing, from the beginning of the world down to the date of the said submission.

In witness whereof, we have hereunto subscribed these presents, this                      day of                      , one thousand eight hundred and

In the presence of C. M. D.

P. Q.  
R. S.  
T. U.

*Release to be executed by Party to an Arbitration, when required in the Award.*

Know all men by these presents, That I, A. B., of the  
of                      , for and in consideration of the sum of one dollar to  
me in hand paid by C. D. of                      , and in pursuance of an  
award made by P. Q., R. S., and T. U., arbitrators between us,  
the said A. B. and C. D., and bearing date the                      day of                      ,  
one thousand eight hundred and                      , do hereby release, and  
forever discharge the said C. D., his heirs, executors, and admin-  
istrators, of and from all actions, cause and causes of action,  
suits, controversies, claims, and demands whatsoever, for, or by  
reason of any matter, cause, or thing, from the beginning of the  
world down to the                      day of                      , one thousand eight hun-  
dred and                      . *[Insert the date of the submission.]*

In witness whereof, I have hereunto set my hand and seal,  
this                      day of                      , 1859.                      A. B. [L. s.]

In presence of C. M. D.



## CHAPTER V.

## ASSIGNMENT.

ASSIGNMENT is the transfer, or passing over, of one's right, interest and ownership, in any particular estate, property or thing, to another; which may be done in some instances by a simple delivery of the property, or by a verbal declaration to that effect, accompanied by the intention between the parties, that the one parts with the thing or property, and that the other receives it and becomes the owner thereof.

In general, however, this act is performed by delivering a writing showing the intention of the parties, which writing is itself called *an assignment*.

An assignment may be a gift, a sale, or a temporary or conditional transfer of ownership or title; and may be made of lands, inheritances, goods, liens, claims, suits, rights—in short, any thing that is property.

If it be necessary to bring suit upon a claim or other matter which has been assigned or sold, such suit must be brought in the name of the assignee, as the plaintiff. The statutes of this state, and of *Oregon* and *Washington*, are uniform, in requiring every action to be prosecuted in the name of the real party in interest, with some exceptions, such as in certain cases of trusts.<sup>1</sup>

Every assignment, in writing or otherwise, of any estate or interest in lands, or in goods in action, or of any rents or profits issuing therefrom, made with intent to hinder, delay or defraud creditors or other persons of their lawful suits, damages, forfeitures, debts or demands, is void.<sup>2</sup>

Every assignment, verbal or written, of goods, chattels, or things in action, made in trust for the use of the person making

<sup>1</sup> Wood's Dig. art. 799; Statutes O. 82; Statutes W. 131.

<sup>2</sup> Wood's Dig. art. 408; Statutes O. 529.

the same, is void against the creditors, existing or subsequent, of such person.<sup>1</sup>

The words "assigned to A. B." written on the back of an account, and signed by the assignor, are held to be a sufficient assignment.

An order drawn by a creditor upon his debtor, for the whole amount of his debt, whether accepted or not, is an assignment of such debt.<sup>2</sup>

Where any interest in land, excepting leases for one year or less, or any trust or power over or concerning lands, or in any manner relating thereto, is assigned, the assignment must be in writing, signed and sealed by the party assigning, or by his agent, lawfully authorized in writing.<sup>3</sup>

Every grant or assignment, of any existing trust, in land, goods, or things in action, unless in writing, subscribed by the party, or his lawfully authorized agent, is void.<sup>4</sup>

Every sale made by a vendor of goods and chattels in his possession or under his control, and every assignment of goods and chattels, unless the same be accompanied by an immediate delivery, and be followed by an actual and continued charge of possession of things sold or assigned, shall be conclusive evidence of fraud, as against the creditors of the vendor or assignor, or subsequent purchasers in good faith; except in cases of contracts of bottomry, respondentia, or assignments, or hypothecations of vessels, or goods at sea, or in foreign states, or out of the state, provided possession of such vessel or goods, be changed as soon as may be after their arrival.<sup>5</sup>

An assignment of a bond, note, or other instrument for the payment of money, secured by a mortgage, is held in this state to have the effect of a transfer of the mortgage also, the latter being only an incident to the debt.<sup>6</sup>

The assignment of a thing carries with it all that belongs to it by right of accession—as interest, or rent.

Transfers of stock in a corporation, to be valid as against third parties, must be entered in the books of the company, so as to

<sup>1</sup> Wood's Dig. art. 899; Statutes O. 527.

<sup>2</sup> Wheatley v. Strobe, Jan. Term, 1859.

<sup>3</sup> Wood's Dig. art. 894; Statutes O. 526.

<sup>4</sup> Wood's Dig. art. 409; Statutes O. 529.

<sup>5</sup> Wood's Dig. art. 408, 404, 406; Statutes O. 527, 528.

<sup>6</sup> 6 Cal. 184.

show the names of the parties, by whom and to whom transferred, the number and designation of the shares, and the date of the transfer.<sup>1</sup>

General assignments by insolvent debtors, for the benefit of their creditors, being confined to the special statutory proceeding provided in the act of the legislature of California, of 1852, are treated of in this volume under the head of "INSOLVENCY."

Although under this statute, a general assignment of the property of an insolvent debtor in trust for the benefit of creditors, cannot be made by a voluntary assignment at common law, but is limited to the statutory assignment prescribed in that act, yet a debtor may transfer his property directly to his creditor, either absolutely in payment of his debts, or as security by way of mortgage.<sup>2</sup>

OREGON.

The statutory provisions quoted or mentioned above, except in relation to insolvent debtors, have been enacted almost identically in *Oregon*.

There being no special legislation prescribing a statutory assignment by insolvent debtors, the common law voluntary assignment may be here briefly considered.

An insolvent debtor may give a preference to one creditor, to the exclusion of all others, provided it be done in good faith; and this even after suit commenced against him by another creditor.

If the assignor reserve to himself the power to revoke the conveyance; or to change the trusts, by giving a preference to other creditors at a future time; or if he direct the surplus, after paying the preferred creditors, to be returned to him; the conveyance will be void. The doctrine is well established, that the debtor must make an unconditional surrender of his effects, for the benefit of those to whom they rightfully belong.

An assignment, made by an insolvent debtor, of all his property, in trust, to pay certain specified creditors, and then, without making provision for the remaining creditors, in trust, to reconvey or reassign the residue to the debtor, is void on its face as to

<sup>1</sup> Wood's Dig. art. 468.

<sup>2</sup> 10 Cal 209, 491.

the creditors not provided for ; and proof that there would be no surplus will not make it good.

General assignments by an insolvent debtor, giving preferences to certain creditors, are upheld reluctantly by our courts, and they must be executed in perfect good faith, and an entire and absolute surrender of the debtor's property must be made for the payment of his debts.

An assignment by an insolvent debtor, in trust, to pay preferred creditors, should not authorize the trustees named therein to sell property on credit.

An assignment for the benefit of creditors, authorizing the assignee, in his discretion, to change the order of preference of the creditors, is fraudulent and void.

Where an assignment is made for the benefit of creditors, it must be accompanied by immediate delivery, either actual or implied.

Voluntary conveyances in trust for creditors are regarded with jealousy, but the question of fraudulent intent is always one of fact, and not one of law.

#### WASHINGTON.

The only general statutory provision upon the subject of assignments in *Washington Territory*, except as already stated, that actions must be prosecuted in the name of the assignee, is as follows :

All deeds of gift, all conveyances, and all transfers or assignments, verbal or written, of goods, chattels, or things in action, made in trust for the use of the person making the same, shall be void as against the existing or subsequent creditors of such person.<sup>1</sup>

No bill of sale for the transfer of personal property, shall be valid as against existing creditors, or innocent purchasers, where the property is left in the possession of the vendor, unless the said bill of sale be recorded in the auditor's office of the county in which the property is situated, within ten days after such sale shall be made.<sup>2</sup>

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<sup>1</sup> Statutes W. T. p. 408.

<sup>2</sup> *Id.* 404.

The law governing voluntary assignments by insolvent debtors, is substantially as quoted above, in treating of the law of assignments in Oregon.

FORMS.

*Simple Form of Assignment (to be Endorsed upon an Instrument.)*

In consideration of the sum of            dollars to me in hand paid, by Geo. L. Kenny, of, &c., the receipt whereof is hereby acknowledged, I do hereby transfer, assign, and set over to the said Geo. L. Kenny, his heirs and assigns forever, all my right, title, or interest in and to the within instrument.

Witness my hand and seal, this fifth day of May, 1861.

ALBERT L. BANCROFT. [L. s.]

In presence of C. M. DERBY.

*Assignment of Bond.*

Know all men by these presents : That I, A. B., of, &c., of the first part, for and in consideration of the sum of one thousand dollars, lawful money of the United States of America, to me in hand paid by C. D., of, &c., of the second part, the receipt whereof is hereby acknowledged, have bargained, sold, and assigned, and by these presents do bargain, sell, and assign, unto the said party of the second part, his executors, administrators, and assigns, a certain written bond or obligation, and the condition thereof, bearing date the fifth day of May, one thousand eight hundred and sixty, executed by E. F. to the said A. B., and all sum and sums of money, due, or to grow due thereon : And I hereby covenant with the said party of the second part, that there is now due on the said bond or obligation, according to the condition thereof, for principal and interest, the sum of            dollars.

In witness, &c.

*Assignment of Note and Mortgage.*

Mortgage dated the            day of, &c., executed by E. F., and M. his wife, to A. B., on certain premises described therein, being part of 50 Vara, lot No. 203, in the city and county of San Francisco ; recorded in the office of the recorder of said county, in book No.            of Mortgages, pages           , &c.

Note bearing date the day aforesaid, executed by E. F. to A. B., aforesaid, in the sum of            dollars, secured by the above mortgage, on the            day of           , 18           , with interest at two per cent. per month.

In consideration of                      dollars, to me paid, by C. D., of, &c., I do hereby assign, transfer and set over, unto the said C. D., the mortgage above described, and the note accompanying the same, as aforesaid, for his use and benefit; hereby authorizing him to collect and enforce payment thereof, but at his own costs and charges. And I do hereby covenant that the sum of                      dollars, with interest from the                      day of                      last past, is now due and owing on the said bond and mortgage; and that I have good right to sell and assign the same.

In witness, &c.

*The Same, Endorsed on Mortgage.*

In consideration of                      dollars, to me in hand paid, by J. W. Park, of, &c., I do hereby sell, assign, transfer, and set over, unto the said J. W. Park, the within indenture of mortgage, together with the note accompanying the same, for his use and benefit.

Witness my hand and seal, &c.

*Assignment of Mortgage and Note.—Another Form.*

Know all men by these presents: That I, Michael C. Nye, of the first part, in consideration of the sum of one thousand dollars, lawful money of the United States of America, to me in hand paid by John Bidwell, of the second part, the receipt of which is hereby acknowledged, have granted, bargained, sold, assigned, transferred and set over, unto the said party of the second part, a certain Indenture of Mortgage bearing date the tenth day of May, A. D. one thousand eight hundred and fifty-two, made and executed by George Thompson, to the said party of the first part, to secure the payment of the sum of eight hundred dollars; together with the promissory note or obligation therein described, and the money due or to grow due thereon, with the interest; which said Indenture of Mortgage is recorded in the office of the recorder of the city and county of San Francisco, in Liber                      of Mortgages, page                      on the eleventh day of May, A. D. 1852, to have and to hold the same unto the said party of the second part, his executors, administrators and assigns, for their use and benefit; subject only to the proviso in the said Indenture of Mortgage mentioned.

And I do covenant to and with the said party of the second part, that I am the lawful owner and holder of the said note and mortgage, and that I have good right to sell, transfer and assign the same as aforesaid. And I do hereby covenant to and with the said party, of the second part, that there is now due and

owing upon the said note and mortgage, the sum of eight hundred dollars, with interest from the first day of March, A. D. one thousand eight hundred and fifty-seven.

In witness whereof I have hereunto set my hand and seal, the tenth day of February, A. D. one thousand eight hundred and fifty-nine.

MICHAEL C. NYE. [L. S.]

Signed, sealed and delivered in the presence of

*Assignment of Bond and Mortgage as Collateral Security.*

This indenture, &c., [as in the forms preceding, then add:] But this indenture [or, this assignment] is, nevertheless, made upon this express condition, that if the said A. B., his heirs, executors or administrators, shall well and truly pay, or cause to be paid, unto the said C. D., his heirs, executors, administrators or assigns, the sum of                  dollars, on or before the day of                  , 18                  , with interest from the date hereof, this indenture [or, this assignment] shall be void and of no effect; it being made for the purpose of securing the payment of the said sum of                  dollars, with interest, as aforesaid, and for no other purpose whatever: And in case the said C. D., his heirs, executors, administrators or assigns, shall collect and receive the money due on said mortgage hereby assigned, he or they shall, after retaining the sum of                  dollars, with the interest thereon, and his or their reasonable costs and charges in that behalf expended, pay the surplus, if any there be, to the said A. B., his heirs, executors, administrators or assigns.

In witness whereof, the said parties have hereto set their respective hands and seals, the day and year first above written, [or, the                  day of                  , 18                  .]

A. B. [L. S.]  
C. D. [L. S.]

Signed, sealed, and delivered, in presence of G. H.

*Assignment of Lease.*

Know all men by these presents: That I, A. B., of, &c., for and in consideration of the sum of                  dollars, lawful money of the United States, to me paid, by C. D., of, &c., have sold, and by these presents, do grant, convey, assign, transfer and set over, unto the said, C. D., a certain indenture of lease, bearing date the                  day of                  , in the year one thousand eight hundred and sixty [when recorded, add the name of the county, the volume and page], made by L. M., of, &c., to me, the said A. B., of a certain dwelling-house and lot, situate in, &c., with all and singular the premises therein mentioned and described, and the buildings thereon, together with the appur-

tenances; to have and to hold the same unto the said C. D., his heirs, executors, administrators and assigns, from the day next, for and during all the rest, residue and remainder, of the term of years mentioned in the said indenture of lease; subject, nevertheless, to the rents, covenants, conditions and provisions, therein also mentioned: And I do hereby covenant and agree, to and with the said C. D., that the said assigned premises now are free and clear, of and from all former and other gifts, grants, bargains, sales, leases, judgments, executions, back rents, taxes, assessments and encumbrances whatsoever.

In witness, &c. [*as above*].

*Assignment of Judgment—short Form.*

For and in consideration of one dollar, to me in hand paid, and for professional services rendered me by Francis Gross, Esq., I do hereby assign, transfer and make over unto him, all my right, title and interest in a certain judgment by me obtained against Joseph Lockwood, in the county court of the city and county of San Francisco, and docketed, this twenty-fifth day of May, A. D. 1859, for the sum of two hundred dollars damages, and ten dollars costs.

In witness whereof I have hereunto set my hand, the day and year last mentioned. H. REARDON.

*The Same, in another Form.*

County Court, Monterey County:

A. B.	}	Judgment docketed 1st July, 1859, for \$195
against		damages and \$8.25 costs.
E. F.	}	For value received, I do hereby assign, transfer,
		and set over, the above mentioned judgment, to C. D., for his
		use, and at his risk, costs and charges, in all respects.
Dated the	day of	, 18 . A. B.

*Assignment of Judgment.*

This indenture, made the fifth day of April, in the year of our Lord one thousand eight hundred and , between Henry H. Byrne of the first part and James F. Bowman of the second part, witnesseth, whereas, the said party of the first part, on the first day of March, one thousand eight hundred and fifty-six, recovered judgment in the District Court of the fourth judicial district of the state of California, against Philip Huchings, for the sum of five thousand dollars.

Now this indenture witnesseth, that the said party of the first



part, in consideration of the sum of three thousand dollars, to him duly paid, has sold, and by these presents does assign, transfer, and set over, unto the said party of the second part, and his assigns, the said judgment, and all sum and sums of money that may be had or obtained by means thereof, or on any proceedings to be had thereupon. And the said party of the first part does covenant, that there is now due on the said judgment the sum of four thousand dollars, and that he will not collect or receive the same, or any part thereof, nor release or discharge the said judgment, but will own and allow all lawful proceedings therein, the said party of the second part saving the said party of the first part harmless of and from any costs in the premises.

In witness whereof, the party of the first part has hereunto set his hand and seal the day and year above written.

HENRY H. BYRNE. [L. S.]

*Assignment of Judgment—full Form.*

In consideration of the sum of thirty-four hundred and ninety <sup>100</sup>/<sub>100</sub> dollars lawful money of the United States of America, to me in hand paid, at or before the ensealing and delivery of these presents, by William C. Belcher, of the city of Marysville, the receipt whereof is hereby acknowledged, I, Erwin Davis of the city of San Francisco, do hereby sell, assign, transfer and set over to the said William C. Belcher and his assigns, all my right title and interest, in and to a certain judgment, recovered by me in the District Court of the twelfth judicial district of the state of California, against Alvin Adams, Daniel H. Haskell and Isaiah C. Woods, composing the firm of Adams & Co., for the sum of thirty-four hundred and thirty-five dollars, besides costs, fifty-five <sup>100</sup>/<sub>100</sub> dollars, making in all thirty-four hundred and ninety <sup>100</sup>/<sub>100</sub> dollars, on the sixteenth day of June, A. D. 1855, and all sum and sums of money that may be had or obtained by means thereof, together with the said judgment. Hereby constituting and appointing the said William C. Belcher my true and lawful attorney irrevocable, with power of substitution and revocation, for his use and at his cost and charges, to take all lawful ways and means for the recovery of the money due or to become due on said judgment, and on payment to acknowledge satisfaction of, or discharge the same. Hereby ratifying and confirming all that my said attorney or his substitute shall lawfully do or cause to be done by virtue hereof.

In witness whereof, I have hereunto set my hand and seal this 22d day of August, A. D. 1855.

ERWIN DAVIS. [L. S.]

Sealed and delivered in presence of }  
W. LEWIS. }

*Assignment of a Debt, or Wages.*

Know all men by these presents: That I, A. B., of, &c., for and in consideration of the sum of        dollars, to me paid by C. D., of, &c., the receipt whereof is hereby acknowledged, have sold, and by these presents do sell, assign, transfer, and set over unto the said C. D., a certain debt due me from E. F., amounting to the sum of        dollars, for goods sold and delivered [*or, work, labor, and services*], with full power to sue for, collect, and discharge, or sell and assign the same: And I hereby covenant, that the said sum of        dollars is justly due as aforesaid.

In witness, &c.

*Assignment of Policy of Insurance.*

Know all men by these presents: That I, A. B., of, &c., in the annexed policy named, for and in consideration of the sum of one dollar, to me in hand paid by C. D., of, &c., the receipt whereof is hereby acknowledged, have sold, assigned, transferred, and set over, and by these presents do sell, assign, transfer, and set over unto the said C. D., the annexed policy of insurance, and all sum and sums of money, interest, benefit, and advantage whatsoever, now due, or hereafter to arise, or to be had or made by virtue thereof; to have and hold the same unto the said C. D. and assigns forever.

In witness, &c.

The above assignment is approved.

M. R., President [*or, Secretary*]  
of the        Insurance Company.

*Assignment of Policy as Security.*

Know all men, &c., [*as in the foregoing to the end, and then add:*] upon the condition, however, that if a certain promissory note for the sum of        dollars, bearing date the        day of       , given by the said A. B. to the said C. D., is well and truly paid, according to the terms thereof, then this assignment is to be void.

In witness whereof, &c. [*adding the approval in the foregoing if necessary*].

*Assignment of a Seaman's Wages.*

Know all men: That I, A. B., for and in consideration of the sum of       , in which I am justly indebted to C. D., of &c., have hereby assigned, sold, and set over, and by these presents I do hereby assign, sell, and set over, unto the said C. D., all such small sums of money as are now due and owing to me, the said A. B., for wages or services on board the ship or vessel

called the \_\_\_\_\_, from the master or owner of said vessel, on board of which vessel I served as a mariner on her voyage from \_\_\_\_\_ to \_\_\_\_\_, which has recently terminated, with full power to prosecute the said vessel, her tackle, apparel, and furniture, freight, cargo, and any and all persons liable therefor, and receive and recover the same, and give discharges therefor.

[*Add covenants that A. B. has not released, and that he will give further assurance.*]

In witness whereof, &c.

*Assignment of a Patent.*

Whereas letters patent bearing date the \_\_\_\_\_ day of \_\_\_\_\_, in the year \_\_\_\_\_, were granted and issued by the government of the United States, under the seal thereof, to A. B., of the town of \_\_\_\_\_, in the county of \_\_\_\_\_, in the state of \_\_\_\_\_, for [*here state the nature of the invention in general terms, as in the patent*] a more particular and full description whereof is annexed to the said letters patent in a schedule; by which letters patent, the full and exclusive right and liberty of making and using the said invention, and of vending the same to others to be used, was granted to the said A. B., his heirs, executors, administrators, or assigns, for the term of fourteen years from the said date:

Now know all men by these presents, that I, the said A. B., for and in consideration of the sum of \_\_\_\_\_ dollars, to me in hand paid, the receipt whereof is hereby acknowledged, have granted, assigned, and set over, and by these presents do grant, assign, and set over, unto C. D., of the town of \_\_\_\_\_, in the county of \_\_\_\_\_, and state of \_\_\_\_\_, his executors, administrators, and assigns, forever, the said letters patent, and all my right, title and interest, in and to the said invention, so granted unto me: To have and to hold the said letters patent and invention, with all benefit, profit and advantage thereof, unto the said C. D., his executors, administrators, and assigns, in as full, ample, and beneficial a manner, to all intents and purposes, as I, the said A. B., by virtue of the said letters patent, may or might have or hold the same, if this assignment had not been made, for and during all the rest and residue of the said term of fourteen years.

A. B.

In witness, &c.

*General Assignment by an Insolvent Creditor, for the Benefit of his Creditors. (For use in Oregon or Washington.)*

This indenture, made the \_\_\_\_\_ day of \_\_\_\_\_, eighteen hundred and \_\_\_\_\_, by and between A. B., of \_\_\_\_\_, merchant, of

the first part, C. D., of                      , of the second part, and the several persons, creditors of the said party of the first part, of the third part, witnesseth :

That whereas the party of the first part is indebted to divers persons in considerable sums of money, which he is at present unable to pay in full, and he is desirous to convey all his property for the benefit of all his creditors, without any preference or priority other than that provided by law :

Now, the party of the first part, in consideration of the premises, and of one dollar paid to him by the party of the second part, hereby grants, bargains, sells, assigns, and conveys unto the party of the second part, and his heirs and assigns, all his lands, tenements, hereditaments, goods, chattels, property, and choses in action, of every name and nature and description, wheresoever the same may be, except such property only as is exempted by law from attachment and execution, as freely described and set forth in the schedule hereto annexed and made a part of this assignment.

To have and to hold the said premises unto the said party of the second part, and his heirs and assigns ;

But in trust and confidence, nevertheless, to sell and dispose of the said real and personal estate, and to collect the said choses in action, using a reasonable discretion as to the times and modes of selling and disposing of said estate, as it respects making sales for cash or on credit, at public auction or by private contract, and with the right to compound for the said choses in action, taking a part for the whole, where the trustees shall deem it expedient so to do ; then in trust to dispose of the proceeds of the said property in the manner following, viz. :

*First.* To pay all such debts as by the laws of the United States or of this state are entitled to a preference in such cases ;

*Second.* To pay the costs and charges of these presents, and the expenses of executing the trusts declared in these presents ;

*Third.* To distribute and pay the remainder of the said proceeds to and among all the parties of the third part, ratably, in proportion to their respective debts ;

And, if there should be any surplus, after paying all the parties of the third part in full, then in trust,

*Fourth.* To pay over such surplus to the party of the first part, his executors, administrators, or assigns.

And the party of the first part hereby constitutes and appoints the party of the second part his attorney irrevocable, with power of substitution, authorizing him, in the name of the party of the first part, or otherwise, as the case may require, to do any and all acts, matters, and things, to carry into effect the true intent and meaning of these presents, which the party of the first part might do if personally present.

And the party of the second part, hereby accepting these trusts, covenants to and with each of the other parties hereto, to execute the same faithfully.

And the party of the first part hereby covenants with the said trustee, from time to time, and at all times when requested, to give him all the information in his power respecting the assigned property, and to execute and deliver all such instruments of further assurance as the party of the second part shall be advised by counsel learned in the law to be necessary in order to carry into full effect the true intent and meaning of these presents.

In witness whereof, the said parties have hereto set their hands and seals the day and year first above written.

Sealed and delivered in	}	A. B. [L. s.]
presence of, E. F.		C. D. [L. s.]
G. H.		

*Transfer of Stock.*

For and in consideration of the sum of ten thousand dollars to me in hand paid, I do hereby sell, assign, and transfer to Jonas Whacke, three shares of stock belonging to me, of the "Poverty Bar Mining Association," of the denomination of five thousand dollars each, and being shares numbered respectively, 321, 375 and 376, and now standing in my name on the books of said company. And I do guarantee, that all assessments to date are duly paid upon said shares and each of them, and I authorize the secretary or other proper officer of said company, to enter this transfer upon the books of said company, showing that I have this day transferred to said Jonas Whacke the said three shares of stock of the numbers and designation above mentioned.

Dated the 9th June, 1859.

NAPOLION GREENSTONE.

## CHAPTER VI.

## ATTACHMENT AND ARREST.

For security in the collection of debts by action at law, an attachment may be issued against the property of the defendant, or the defendant may be arrested and held to bail in certain cases. The limits and plan of the present work will admit of but little more than a statement of the cases in which an attachment or order of arrest may be issued, the statute authorizing the discharge of an imprisoned debtor, and the corresponding forms.

An attachment may be issued against the property of the defendant at the beginning of the suit, or afterward, as security for the satisfaction of any judgment that may be recovered, unless the defendant give security to pay such judgment in the following cases:<sup>1</sup>

The plaintiff, at the time of issuing the summons, or at any time afterward, may have the property of the defendant attached as security for the satisfaction of any judgment that may be recovered, unless the defendant give security to pay such judgment in the following cases: 1. Where the debtor is not a resident of this state. 2. Where the debtor has absconded or absented himself from his usual place of abode, or is about to abscond or absent himself, so that the ordinary process of law cannot be served upon him. 3. Where the debtor conceals himself, so that the ordinary process of law cannot be served upon him. 4. Where the debtor has removed, or is about to remove any of his property or effects out of this state, to the injury of his creditors, or with the intent to hinder, delay, or defraud them. 5. Where the debtor has fraudulently conveyed, assigned, or otherwise disposed of, or is about to fraudulently convey, assign, or otherwise dispose of his property or effects with the intent to hinder, delay, or defraud his creditors. 6. Where the debtor has fraudulently concealed, or is about to fraudulently conceal his

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<sup>1</sup> Laws 1858, p. 152.

property or effects, with the intent to hinder, delay, or defraud his creditors. 7. Where the debtor fraudulently contracted the debt or incurred the obligation, respecting which the suit is brought.

The clerk of the court shall issue the writ of attachment upon receiving an affidavit by or on behalf of the plaintiff, which shall be filed, showing: 1. That the defendant is indebted to the plaintiff in a certain sum (*specifying the amount of such indebtedness*), over and above all legal set-offs or counter-claims, upon a contract, express or implied, for the direct payment of money, and that such contract was made, or is payable, in this state, and that the payment of the same has not been secured by any mortgage on real or personal property. 2. That the deponent has good reason to believe, and does believe, that one or more of the causes set forth in the several subdivisions of the next preceding section actually exists at the time of making the affidavit, reciting the facts upon which such belief is founded.

Before issuing the writ, the clerk shall require a written undertaking on the part of the plaintiff, in a sum not less than two hundred dollars, nor exceeding the amount claimed by the plaintiff, with sufficient sureties, to the effect that, if the defendant recover judgment, or if the attachment should be dismissed, the plaintiff will pay all costs that may be awarded to the defendant, and all damage which he may sustain by reason of the attachment, not exceeding the sum specified in the undertaking.

An order of arrest against the defendant may be obtained in the following cases:<sup>1</sup> 1. In an action for the recovery of money or damages on a cause of action arising upon contract, express or implied, when the defendant is about to depart from the state, with intent to defraud his creditors, or when the action is for wilful injury to person, to character, or to property, knowing the property to belong to another. 2. In an action for a fine or penalty, or for money or property embezzled or fraudulently misapplied or converted to his own use by a public officer, or an officer of a corporation, or an attorney, factor, broker, agent, or clerk, in the course of his employment as such; or by any other person in a fiduciary capacity, or for misconduct or neglect in office or in a professional employment, or for a wilful violation of

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<sup>1</sup> Wood's Dig. art. 808, *et seq.*

duty. 3. In an action to recover the possession of personal property unjustly detained, when the property, or any part thereof, has been concealed, removed, or disposed of, so that it cannot be found or taken by the sheriff. 4. When the defendant has been guilty of fraud in contracting the debt or incurring the obligation for which the action is brought, or in concealing or disposing of the property, for the taking, detention, or conversion of which the action is brought. 5. When the defendant has removed or disposed of his property, or is about to do so, with intent to defraud his creditors.<sup>1</sup>

An order for the arrest of the defendant shall be obtained from a judge of the court in which the action is brought, or from a county judge.

The order may be made whenever it shall appear to the judge, by the affidavit of the plaintiff or some other person, that a sufficient cause of action exists, and that the case is one of those mentioned in this chapter, above. The affidavit shall be either positive or upon information and belief; and, when upon information and belief, it shall state the facts upon which the information and belief are founded. If an order of arrest be made, the affidavit shall be filed with the clerk of the county.

Before making the order, the judge shall require a written undertaking on the part of the plaintiff, with sureties, to the effect that, if the defendant recover judgment, the plaintiff will pay all costs and charges that may be awarded to the defendant, and all damages which he may sustain by reason of the arrest, not exceeding the sum specified in the undertaking, which shall be at least five hundred dollars. Each of the sureties shall annex to the undertaking an affidavit that he is a resident and householder, or freeholder within the state, and worth double the sum specified in the undertaking, over and above all his debts and liabilities, exclusive of property exempt from execution. The undertaking shall be filed with the clerk of the court.

When the debt sought to be secured is not over two hundred dollars, the remedy by attachment or arrest must be prosecuted in the Justices' Court, and under the statute provided for such proceedings in that court.

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<sup>1</sup> Wood's Dig. art. 506, *et seq.*



ACT OF APRIL 22, 1850, FOR RELIEF OF PERSONS IMPRISONED ON CIVIL PROCESS.

SECTION 1. Every person confined in jail on an execution issued on a judgment rendered in a civil action, shall be discharged therefrom upon the conditions hereinafter specified.

SEC. 2. Such person shall cause a notice in writing to be given to the plaintiff, his agent or attorney, that at a certain time and place he will apply to the judge of the district court of the county in which such person may be confined; or, in case of his absence or inability to act, to the judge of the county court of the county in which such person may be imprisoned, for the purpose of obtaining a discharge from his imprisonment. In the county of San Francisco, the application may be made to a judge of the superior court of the city of San Francisco.

SEC. 3. Such notice shall be served upon the plaintiff, his agent or attorney, one day at least before the hearing of the application, in cases where the plaintiff, his agent or attorney, lives within twenty miles of the place of hearing; and one day shall be added for every additional twenty miles that such person may reside from the place of hearing.

SEC. 4. At the time and place specified in the notice, such person shall be taken before such judge, who shall examine him under oath concerning his estate and property, and effects, and the disposal thereof, and his ability to pay the judgment for which he is committed, and such judge shall also hear any other legal and pertinent evidence that may be produced by the debtor or the creditor.

SEC. 5. The plaintiff in the action may, upon such examination, propose to the prisoner any interrogatories pertinent to the inquiry; and they shall, if required by him, be proposed and answered in writing; and the answer shall be signed and sworn to by the prisoner.

SEC. 6. If upon the examination, the judge shall be satisfied that the prisoner is entitled to his discharge, such judge shall administer to him the following oath, to wit: (*See Forms.*)

SEC. 7. After administering the oath, the judge shall issue an order that the prisoner be discharged from custody, if he be imprisoned for no other cause; and the officer, upon the service of such order, shall discharge the prisoner forthwith, if he be imprisoned for no other cause.

SEC. 8. If such judge should not discharge the prisoner, he may apply for his discharge at the end of every succeeding ten days, in the same manner as above provided, and the same proceedings shall thereupon be had.

SEC. 9. The prisoner, after being so discharged, shall be forever exempted from arrest or imprisonment for the same debt, unless he shall be convicted of having wilfully sworn falsely upon his examination before the judge, or in taking the oath before prescribed.

SEC. 10. The judgment against any prisoner who is discharged as aforesaid, shall remain in full force against any estate, which may then or at any time afterward belong to him, and the plaintiff may take out a new execution against the goods and estate of the prisoner, in like manner as if he had never been committed.

SEC. 11. The plaintiff in the action may at any time order the prisoner to be discharged, and he shall not thereafter be liable to imprisonment for the same cause of action.

SEC. 12. Whenever a person is committed to jail on an execution issued on a judgment recovered in a civil action, the creditor, his agent or attorney, shall advance to the jailor, within twenty-four hours after such commitment, sufficient money to pay for the support of said prisoner during the time for which he may be imprisoned, and in case the money should not be so advanced, or if, during the time the prisoner may be in confinement, the money should be expended in the support of such prisoner, and the creditor should neglect for twenty-four hours to advance such further sum as might be necessary for his support, the jailor shall forthwith discharge such prisoner from custody; and such discharge shall have the same effect as a discharge by order of the creditor.

#### FORMS.

#### *Affidavit for Attachment.*

12th District Court,

A. B. }  
against  
C. D. }

City and County of San Francisco, ss:

A. B., the plaintiff in the action above named, being duly sworn, deposes and says, that the defendant above named is in-

debted to him, the said plaintiff, in a certain sum, that is to say, in the sum of five hundred dollars, over and above all legal set-offs and counter-claims, upon an express [*or, implied*] contract for the direct payment of money, and that such contract was made and is payable in this state, and that the payment of the same has not been secured by any mortgage on real or personal property.

And this deponent further says that he, this deponent, has good reason to believe, and does believe, that the following cause for issuing an attachment in this action actually exists at the time of making this affidavit, to wit: That the said defendant, the debtor above named, is a non-resident of this state [*or, that the debtor above named has absconded, &c., &c., or other cause of attachment, as prescribed in the act*], that the facts upon which such belief is founded are as follows: [*here set forth the facts.*]

A. B.

Sworn and subscribed before me, this fifth day of May, 1859.

JOHN HANNA, Deputy Clerk.

*Undertaking on Attachment.*

12th District Court,

A. B. }  
*against* }  
 C. D. }

Whereas, the above-named plaintiff has commenced, or is about to commence an action in the District Court of the twelfth judicial district of the state of California, against the above-named defendant, upon a contract for the direct payment of money, claiming that there is due to said plaintiff from said defendant the sum of five hundred dollars, or thereabouts, and he is about to apply for an attachment against the property of said defendant, as security for the satisfaction of any judgment that may be recovered therein:

Now, therefore, we, the undersigned, residents of the city and county of San Francisco, in consideration of the premises, and of the issuing of said attachment, do jointly and severally undertake, in the sum of two hundred and fifty dollars, and promise, to the effect that, if defendant recover judgment, or if the attachment should be dismissed, in said action, said plaintiff will pay all the costs that may be awarded to the said defendant, and all damages which he may sustain by reason of the said attachment, not exceeding the sum specified in said undertaking of two hundred and fifty dollars.

Dated at San Francisco, this fifth day of May, A. D. 1859.

E. F.

G. H.

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HANCOCK'S CALIFORNIA LAWYER.

of the City and County of San Francisco, as:  
whose names are subscribed as sureties to the  
being severally duly sworn, each for himself  
that he is worth two hundred and fifty dollars,  
the said undertaking specified as the penalty thereof,  
all his debts and liabilities, exclusive of property  
subject to this execution.

E. F.  
G. H.

Subscribed and sworn to before me, this fifth day of May,  
JOHN HANNA, Deputy Clerk.

*Endorsement on the above Undertaking.*

Approved and filed this fifth day of May, A. D. 1859.

WILLIAM DUER, Clerk.

By D. P. BELKNAP, Deputy Clerk.

*Writ of Attachment.*

In the District Court of the 12th Judicial District, }  
City and County of San Francisco, }

A. B. }  
against }  
C. D. }

The People of the State of California to the Sheriff of the City  
and County of San Francisco, greeting:

Whereas, the above-entitled action was commenced in the  
District Court of the 12th judicial district of the state of Cali-  
fornia, by the above-named plaintiff, to recover from the said  
defendant the sum of five hundred dollars or thereabouts, besides  
interest and costs of suit; and the necessary affidavit and under-  
taking herein having been filed, as required by law:

Now we do therefore command you, the said sheriff, that you  
attach and safely keep all the property of the said defendant,  
within your said county (not exempt from execution), or so  
much thereof as may be sufficient to satisfy the said plaintiff's  
demand, as above mentioned, unless the said defendant gives you  
security, by the undertaking of at least two sufficient sureties, in  
amount sufficient to satisfy such demand, besides costs; in which  
case you will take such undertaking, and hereof make due and  
legal service and return.

Witness, the Hon. EDWARD NORTON, Judge of the said District  
Court of the 12th Judicial District, this fifth day of May, A. D.  
1859.

Attest my hand and seal of the said court, the day and year  
last above written.

WILLIAM DUER, Clerk.

By BEVERLY C. DUER, Deputy Clerk.

*Affidavit for Order of Arrest.*

State of California, }  
 In the District Court of the 4th Judicial District, }  
*M. N. et al.* }  
*against* }  
*O. P.* }

M. N., one of the plaintiffs in this suit, being duly sworn, deposes and says, that the cause of action in this case arose after the passage of the act of the legislature of the state of California, entitled, "An Act to regulate proceedings in civil cases in the Courts of Justice of this State," passed April 29, 1851. That it is an action for the recovery of money or damages, in a cause of action arising upon an express contract, and that the defendant is about to depart from this state with the intent to defraud his creditors [*or set out other ground of arrest as prescribed by the statute*].

And deponent further states and shows to the court the following facts and circumstances in support of the above allegations of fraud, that is to say: [*Here set out the facts, &c.*] M. N.

Sworn to before me, this tenth day of September, A. D. 1859.

B. C. DUEK, Deputy Clerk.

*Undertaking on Arrest.*

4th District Court,  
*M. N. et al.* }  
*against* }  
*O. P.* }

Whereas, the above-named plaintiffs have commenced, or are about to commence an action in the District Court of the fourth judicial district, against the above-named defendant, and are about to apply for an order for the arrest of the said defendant in said action:

Now, therefore, we the undersigned, residents of San Francisco, in consideration of the premises, and of the issuing of said order of arrest, do undertake, in the sum of five hundred dollars, and promise, to the effect that, if the said defendant recovers judgment, the said plaintiffs will pay all costs and charges that may be awarded to the said defendant, and all damages which he may sustain by reason of the arrest, not exceeding the sum of five hundred dollars.

Dated, this tenth day of September, A. D. 1859.

W. X.  
 Y. Z.

County of San Francisco, ss:

W. X., one of the sureties, whose name is subscribed to the above undertaking, being duly sworn, deposes and says, that he

**WITNESSES CALIFORNIA LAWYER.**

... within this state, and is worth double  
... undertaking specified as the penalty thereof,  
... debts and liabilities, exclusive of property  
...  
... before me, this tenth day of Septem-  
...  
BEVERLEY C. DUEB, Deputy Clerk.

...  
... the sureties, whose name is subscribed to the  
... being duly sworn, deposes and says, that he  
... and householder within this state, and is worth  
... specified in the said undertaking as the penalty  
... and above all his debts and liabilities, exclusive of  
... from execution. Y. Z.  
... and sworn to, before me, this tenth day of Septem-  
...  
BEVERLEY C. DUEB, Deputy Clerk.

*Enforcement on above Undertaking.*

... tenth day of September, A. D. 1859.  
JOHN S. HAGAR, Judge.  
... tenth day of September, A. D. 1859.  
B. C. DUEB, Dep. Clerk.

*Order of Arrest.*

... Court,  
...  
... }

Sheriff of the County of San Francisco:  
The above-named plaintiffs having commenced an action in  
the District Court of the fourth judicial district of the state of  
California against the above-named defendant, and it duly ap-  
pearing to me from affidavits submitted on the part of said  
plaintiffs that a sufficient cause of action exists, and that the case  
is one of those mentioned in section seventy-three of the act  
entitled, "An Act to regulate proceedings in civil cases in the  
Courts of Justice of this State," passed April 29, 1851, and the  
necessary undertaking having been given, I, the undersigned,  
Judge of the said District Court, by virtue of the authority in me  
conferred by law, do order and require you, the said sheriff of the  
county of San Francisco, forthwith to arrest the said defendant,  
if he may be found in your county, and hold him to bail in said  
action, in the sum of five hundred dollars, and that you return  
this order, with your proceedings thereon, to the clerk of the said  
District Court, on the fifteenth day of September, 1859.  
Dated, San Francisco, the tenth day of September, A. D.  
JOHN S. HAGAR, Judge.

*Proceedings to obtain Discharge from Imprisonment under Civil Process.*

## NOTICE.

A. B. }  
 vs. } In the District Court of the Twelfth Judicial Dis-  
 C. D. } trict, City and County of San Francisco.

To A. B., the plaintiff above named ;

You will take notice, that I will apply to the Hon. Edw. Norton, judge of the District Court of the twelfth judicial district, in and for the city and county of San Francisco, in the court room of said court, in the city hall of said city and county, on Saturday the eighteenth day of June, A. D. 1859, at ten o'clock of that day, or as soon thereafter as counsel can be heard, for the purpose of obtaining a discharge from imprisonment, under the provisions of the act of April 22d, 1850, for the relief of persons imprisoned on civil process.

Respectfully yours,

C. D., defendant.

*Oath of Imprisoned Debtor.*

I, , do solemnly swear that I have not any estate, real or personal, to the amount of fifty dollars, except such as is by law exempted from being taken in execution ; and that I have not any other estate now conveyed or concealed, or in any way disposed of, with design to secure the same to my use, or to defraud my creditors : so help me God.

*Order for Discharge.*

A. B. }  
 vs. } [*Title of Court as in notice.*]  
 C. D. }

Application having been made to me by C. D., the defendant above named, to be discharged from imprisonment under the provisions of the act of April 22d, 1850, for relief of persons imprisoned under civil process, and the said C. D. being by me examined under oath, concerning his property and his ability to pay the judgment for which he is committed, and it appearing to me that the said C. D. is entitled to his discharge from imprisonment, it is therefore ordered that the said C. D. be discharged from custody, if he is imprisoned for no other cause.

Date.

EDW. NORTON.

Judge of the District Court, 12th Judicial District.

## CHAPTER VII.

## AUCTIONEERS.

## STATUTORY PROVISIONS.

By the act of 1859 it is provided that any citizen of the state may become an auctioneer for the county in which he resides, on giving bonds for the faithful performance of his duties, with one or more sureties in the sum of five thousand dollars, payable to the people of the state of California, to be approved by the county judge and filed with the county clerk.

In addition to filing such bond the auctioneer must obtain a license quarterly from the county treasurer, rated as follows:

*First class.* Auctioneers whose average monthly sales shall amount to one hundred thousand dollars and upward, shall constitute the first class, and shall pay a license of four hundred dollars per quarter.

*Second class.* Those between seventy-five thousand and one hundred thousand, three hundred dollars per quarter.

*Third class.* Those between fifty thousand and seventy-five thousand, two hundred dollars per quarter.

*Fourth class.* Those between thirty thousand and fifty thousand, one hundred and twenty-five dollars per quarter.

*Fifth class.* Those between twenty thousand and thirty thousand, one hundred dollars per quarter.

*Sixth class.* Those between ten thousand and twenty thousand, sixty dollars per quarter.

*Seventh class.* Those less than ten thousand, twenty-five dollars per quarter.

The said act of 1859, also contains the following provisions:

SECTION 5. No section of this act shall be so construed as to require a license, to be obtained for the selling of any goods at public sale that may belong to the United States, or to this state,



or upon property sold by virtue of any process issued by any state court, or United States court.

SEC. 6. Every auctioneer applying to the county treasurer for a renewal of his license, under the provisions of [this] act, shall accompany the application with a statement, under oath, which shall set forth that his average receipts per month, on account of sales during the preceding quarter, do not exceed the amount specified in the class of license for which he applies, and any auctioneer, already established in business, applying for a license, as provided in this act, for the first quarter after its passage, shall take out a license in proportion to his average monthly sales for the preceding quarter, and it is hereby made the duty of such treasurer to provide blank forms of affidavit for that purpose, and administer the oath required to such applicants, without charge.

SEC. 7. No auctioneer shall be permitted to transfer his license to any other person for any part of the time, or at any time during the period for which his license may have been issued; nor shall any auctioneer be permitted to use his license for the purpose of transacting an auction business in more than one store or specified place of business.

SEC. 8. Any auctioneer who shall fail to comply with the provisions of this act, or any person acting as an auctioneer, without first having complied with its provisions, shall be deemed guilty of a misdemeanor, and on conviction thereof in any court of competent jurisdiction, shall be fined not less than fifty, nor more than five hundred dollars for each and every article sold or offered for sale; and in default of payment of such fine, shall be imprisoned in the county jail for a period not exceeding ninety days, at the discretion of the judge before whom the case may be tried.

SEC. 9. In any city or town where there is no auctioneer, the sheriff, or a constable, shall be *ex officio* auctioneer, and shall be permitted to sell any property, real or personal, at public auction; and for any delinquency, as *ex officio* auctioneer, he shall be liable on his official bond.

SEC. 10. It shall be the duty of every auctioneer, who shall sell any animal of the horse kind, or any mules, to keep a book, in which he shall register the name of each and every person

bringing or offering any horse or mule to be sold, and the name of the person purchasing such horse or mule, together with the date of such sale or sales, and a description of each horse or mule so sold, together with the marks and brands. Said book shall be a public record, and subject to the inspection of any person desiring to inspect the same.

SEC. 11. Each auctioneer shall keep a book in which he shall enter a memorandum of all sales, showing the name of the owner or owners of the goods sold, to whom sold, and the amount paid, and the date of each sale, which book shall at all times be open for the inspection of any person or persons interested therein.

SEC. 15. Provides for the repeal of all acts or parts of acts conflicting with this act, except as to rights vested under the former acts.

Whenever goods shall be sold at auction, and the auctioneer shall, at the time of sale, enter in a sale book a memorandum, specifying the nature and price of the property sold, the terms of the sale, the name of the purchaser and the name of the person on whose account the sale is made, such memorandum shall be deemed a note of the contract of sale within the meaning of the statute of frauds.<sup>1</sup>

#### JUDICIAL DECISIONS.

The memorandum of an auctioneer is looked upon as a contract between the vendor and vendee, reduced to writing, and executed by their mutual agent, who ceases to be such agent after the sale is closed, and he must therefore sign the memorandum at the time of sale. Where the sale is made in the forenoon, and the memorandum not made until the evening of the same day, it is too late.<sup>2</sup>

When goods are sold at auction and a bill of particulars made out and delivered to the purchaser, and the money or a portion of it paid, it becomes an executed contract, and the vendor will not be permitted to set up a mistake as to the quantity sold.<sup>3</sup>

Auctioneers who sell a balance without specifying quantity, have a reasonable time to ascertain such balance, and when so

<sup>1</sup> Wood's Dig. art. 402.

<sup>2</sup> 4 Cal. 64.

<sup>3</sup> Craig v. Godfrey, 1 Cal. 473.

done, and it is acquiesced in by the purchaser, they cannot avoid it.<sup>1</sup>

An auctioneer who receives and sells stolen property innocently, and in the ordinary course of his business, is liable to the true owner for the conversion thereof.<sup>2</sup>

And he is thus liable, although the felon has not been prosecuted and convicted, and although he had paid over to the felon the money received on the sale of the goods, before notice that the goods had been stolen.<sup>3</sup>

A sale of land at auction, where no note or memorandum of sale is made by the auctioneer, and no writing exists between the parties, is void by the statute of frauds.<sup>4</sup>

## FORMS.

*Auctioneer's Bond.*

Know all men by these presents, that we, S. L. Jones, G. L. J. Bendixen and Wm. M. Randell, copartners doing business as auctioneers, in the city and county of San Francisco, state of California, under the name and firm of Jones and Bendixen, as principals, and C. De Ro, as surety, are held and firmly bound unto the people of the state of California, in the sum of five thousand dollars, lawful money of the United States of America, to be paid to the people of the state of California, for which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents, sealed with our seals and dated the tenth day of May, one thousand eight hundred and fifty-nine.

The condition of the above obligation is such, that if the said S. L. Jones, G. L. J. Bendixen and Wm. M. Randell, copartners and auctioneers, as aforesaid, shall faithfully perform their duties, as auctioneers, within the city and county of San Francisco, state of California, in accordance with the provisions of an act, entitled "An Act to provide and define their duties and liabilities, Approved April 18th, 1859," and the law governing in such cases; then this obligation to be void, otherwise to remain in full force and effect.

S. L. JONES. [L. s.]

GEO. L. J. BENDIXEN. [L. s.]

WM. M. RANDELL. [L. s.]

CHS. DE RO. [L. s.]

Signed and delivered in the presence of W. H. V. CROUISE.

<sup>1</sup> 4 Cal. 64.

<sup>2</sup> 6 Cal. 75.

<sup>3</sup> 1 Cal. 429.

*Justification of the above Surety.*

State of California,  
City and County of San Francisco. } ss:

Before me, H. A. Cobb, a Notary Public in and for said city and county of San Francisco, personally came Charles De Ro, the surety on the within bond, who, being duly sworn, did depose and say, that he is worth the sum of ten thousand dollars, over and above all his debts and liabilities, in unencumbered property within the aforesaid city and county and state, which may be levied on, and is not exempt from execution and forced sale.

CHS. DE RO.

Subscribed and sworn to before me, this sixth day of June, A. D. 1859. H. A. COBB, Notary Public. [L. s.]

*Auctioneer's Application for a State and County License, under Act of the Legislature, approved April 18th, 1859.*

San Francisco, 18 .

To the Treasurer of the City and County of San Francisco:

The undersigned A. B., transacting business in the city and county of San Francisco, as auctioneer, having duly filed the bond required by the act above named, hereby makes application for a license of the class, for the quarter commencing on the day of 18 , and ending on the day of 18 . A. B., Auctioneer.

*Oath.*

State of California,  
City and County of San Francisco. } ss:

Personally came before me, A. B., of the firm of auctioneer, doing business in the state, city and county aforesaid, who, being duly sworn, says, that the average receipts per month of the said firm on account of sales during the quarter next preceding the day of 18 , amounted to less than thousand dollars, as specified in the class of license applied for, and further deponent says not. A. B.

Subscribed and sworn to before me, this day of 18 . Treasurer.

## CHAPTER VIII.

## BILL OF SALE.

THE term *bill of sale* is applied to a written instrument which is the evidence of an act of sale, of goods and chattels. A distinction exists between an assignment and a bill of sale, in this, that the term assignment applies to transfers of real as well as personal estate, and to transfers of personal estate made verbally or by deed or other writing.

A chattel mortgage is in form a bill of sale, coupled with a condition that the property may be redeemed and returned to the owner, upon his paying the debt to secure which the mortgage was given, together with interest and expenses.

A bill of sale not under seal is insufficient to convey a mining claim.<sup>1</sup> Many principles of law and various statutory provisions concerning assignments, apply also to bills of sale, and reference is therefore made to the chapters on ASSIGNMENT, and also that on CHATTEL MORTGAGE.

## FORMS.

*Bill of Sale—simple Form.*

In consideration of two hundred and fifty dollars to me in hand paid by Bruno Bernal, I do hereby sell and deliver to him my Alazan horse, branded C, on the left hip.

San José, June 10, 1859.

PEDRO CHEVOYA.

*Another Form.*

Received of John Pike \$1,000, in payment of five thousand fruit-trees I have sold and delivered to him, this 4th day of May, 1859.

F. PREVAUX.

*Bill of Sale of Goods and Chattels.*

Know all men by these presents : That I, Charles Swift, of the town of Oro, in the county of Yuba, and state of California, of

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<sup>1</sup> 7 Cal. 152.

the first part, for and in consideration of the sum of dollars, lawful money of the United States, to me paid by James Diggs, of, &c., of the second part, the receipt whereof is hereby acknowledged, have bargained and sold, and by these presents do grant and convey, unto the said party of the second part, his executors, administrators and assigns, the one equal, undivided half, of one hundred acres of barley, now growing on the rancho of E. F., near the town of Oro, aforesaid, one roan horse, and five thousand sheep belonging to me, and now in my possession, at the place last aforesaid; to have and to hold the same unto the said party of the second part, his executors, administrators and assigns, forever. And I do, for myself, my heirs, executors and administrators, covenant and agree, to and with the said party of the second part, his executors, administrators and assigns, to warrant and defend the sale of the said property, goods and chattels, hereby made, unto the said party of the second part, his executors, administrators and assigns, against all and every person and persons whomsoever.

Witness my hand and seal this 21st day of May, A. D. 1859.

CHARLES SWIFT. [L. s.]

*Bill of Sale of Registered or Enrolled Vessel.*

Know all men by these presents: That I, A. B., of, &c., owner of the bark or vessel called the "Paul Pry," of the burden of three thousand tons, or thereabouts, now lying at the port of \_\_\_\_\_, for and in consideration of the sum of \_\_\_\_\_ dollars, lawful money of the United States, to me paid, by C. D., of the place aforesaid, the receipt whereof I hereby acknowledge, have bargained and sold, and by these presents do bargain and sell, unto the said C. D., his executors, administrators and assigns, all the hull or body of said bark or vessel, together with the masts, bowsprit, sails, boats, anchors, cables, spars, and all other necessities thereunto appertaining and belonging; the certificate of the registry of which said bark or vessel, is as follows, to wit: [*copy certificate of registry in full:*] To have and to hold the said bark or vessel, and appurtenances thereunto belonging, unto the said C. D., his executors, administrators and assigns, to his and their proper use, benefit and behoof, forever. And I do, for myself, my heirs, executors and administrators, covenant and agree, to and with the said C. D., his executors, administrators and assigns, to warrant and defend the said bark or vessel, and all the before mentioned appurtenances, against all and every person and persons whomsoever.

In witness, &c., [*as in foregoing.*]

See ASSIGNMENT, CHATTEL MORTGAGE, MINING, &c.

## CHAPTER IX.

## BONDS.

A **BOND** is a written obligation, under seal, holding the party who executes it to some performance, duty, obligation, or payment.

An obligation under seal to pay a sum of money at a certain time, is called a *single bond*; but there is usually a condition affixed, upon the performance of which the bond is to be void, that may be termed a *conditional* bond.

It is usual to make the penalty of a bond twice the amount of the real debt, so as to cover interest and costs, as the party cannot recover beyond the amount expressed in the bond, even if the debt or damages secured should, when they come to be collected, amount to more than the penal sum of the bond.

In California, a seal may be made by an impression on wafer, or wax, or any impressible substance, or on the paper itself, or by writing a scroll with the pen.

The legal effect, at common law, of a bond, as differing from an obligation of like purpose not under seal is, that the seal is held to import that a consideration existed for giving the bond. But by the statute of California, bonds are placed upon the same footing with other non-negotiable instruments for the payment of money or goods, so that if suit be brought on a bond which was given without consideration, or where the consideration has failed in whole or in part, the defendant may plead and prove in defence such want or failure of consideration.<sup>1</sup>

The statute referred to, embraces within its provisions, bonds, due-bills, and other instruments of writing not negotiable, made by any person, or body politic or corporate, for the payment of money, or articles of personal property, or the payment of money in personal property, or acknowledging any such indebtedness.

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<sup>1</sup> Wood's Dig. art. 192 and 201; Comstock v. Dennis. Jan. Term, 1858.

It also provides that any such instrument may be assigned by endorsement, in the same manner as bills of exchange,<sup>1</sup> and the assignee may recover the same of the maker by suit in his own name; except that the defendant can set up in answer, any defence to the instrument that arose before he had notice of such assignment.<sup>2</sup>

It also provides that the assignee, if he fails to recover of the maker of such bond or other instrument, may recover of the assignor; provided he has used due diligence, by suing the maker within sixty days after the maturity of the obligation; or, the maker absconds within twenty days; or, a suit, if instituted, would have been unavailing.<sup>3</sup>

It also provides that fraud or circumvention used in obtaining or making the instrument, shall vitiate the same.

A bond, and all written instruments, may be sued on at any time within four years after they become due, but not afterward. But when the party liable dies within that time, claim must be presented to his representatives, within ten months after it becomes due, or the debt will be lost. See chapter on EXECUTORS AND ON ADMINISTRATORS, and see index, LIMITATION OF ACTIONS.

A bond required by law, or the provisions of any statute, will be deemed sufficient if it conform substantially to the form prescribed by the statute, and do not vary in any matter, to the prejudice of the rights of the party to whom, or for whose benefit, such bond shall be given.<sup>4</sup> So in California it has been held that where the word *plaintiff* was by mistake used for *defendant*, in reciting the condition, the bond was held good;<sup>5</sup> and that sureties to a bail bond cannot avail themselves in defence to an action thereon of an insufficiency of the justification of the undertaking.<sup>6</sup>

A *bottomry* bond is an obligation founded on the joint security of a ship and its owners, and given for money borrowed, which is to be repaid on the successful termination of a voyage. At home, the bond is executed by the owners, or the master as their agent. In a foreign country, the master has full authority to

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<sup>1</sup> Wood's Dig. art. 198.

<sup>2</sup> Id. 199.

<sup>3</sup> Id. 200.

<sup>4</sup> 7 Paige, 50; 26 Wend. 502.

<sup>5</sup> 8 Cal. 549.

<sup>6</sup> 7 Cal. 402.



bind the owners, and pledge the ship and cargo by a bottomry bond, in cases of necessity. Any amount of interest may be exacted, so long as the sea-risk continues, irrespective of the usury laws; but when that terminates, the obligation will only draw legal interest. *Respondentia* is a contract similar to *bottomry*, except that the loan is made upon the chance of the safe arrival of the cargo. Like bottomry, it is used in cases of emergency.

An alteration of a bond, or other sealed instrument, in a material part, without the consent of the obligor, by any party claiming to recover under it, renders it void; otherwise, if the alteration be made by a stranger, provided the true contents can be made to appear by testimony, though the burden of proof will then be thrown on the party claiming under the instrument. But no alteration or erasure will defeat the recovery of the bond, unless it materially affects the rights or condition of the obligor, or is the result of a fraudulent intent to effect the same object.<sup>1</sup>

Bonds of public officers and other bonds of a special character are treated of under their respective titles. See Index.

## FORMS.

*Common Bond with Condition.*

Know all men by these presents: That I, A. B., of the town of \_\_\_\_\_, in the county of \_\_\_\_\_, and state of California, am held and firmly bound unto C. D., of, &c., in the sum of one thousand dollars, lawful money of the United States, to be paid to the said C. D., his executors, administrators, or assigns; for which payment, well and truly to be made, I bind myself, my heirs, executors, and administrators, firmly by these presents.

Sealed with my seal. Dated the \_\_\_\_\_ day of \_\_\_\_\_, one thousand eight hundred and \_\_\_\_\_

The condition of the above obligation is such, that if the above bounden A. B., his heirs, executors, or administrators, shall well and truly pay, or cause to be paid, unto the above-named C. D., his executors, administrators, or assigns, the just and full sum of five hundred dollars, in five equal annual payments, from the date hereof, with lawful interest, then the above obligation to be void; otherwise to remain in full force and virtue.

Sealed and delivered, }  
in presence of }  
G. H. }

A. B. [L. s.]

<sup>1</sup> 2 Cal. 520.

*Bond to a Corporation.*

Know all men by these presents: That I, A. B., of, &c., am held and firmly bound, unto the S. F. Gas Company, in the sum of one thousand dollars, lawful money of the United States, to be paid to the said S. F. Gas Company or assigns; for which payment, well and truly to be made, I bind myself, my heirs, executors, and administrators, firmly by these presents.

Sealed with my seal. Dated the            day of            , one thousand eight hundred and

The condition of the above obligation is such, that if the above bounden A. B., his heirs, executors, or administrators, shall well and truly pay or cause to be paid, unto the above-named S. F. Gas Company, or assigns, the just and full sum of, &c. [*as in foregoing*].

*Bond of two Obligors.*

Know all men by these presents: That we, A. B. and E. F., of, &c., are held and firmly bound unto C. D., of, &c., in the sum of one thousand dollars, lawful money of the United States, to be paid to the said C. D., his executors, administrators, or assigns; for which payment, well and truly to be made, we bind ourselves, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents.

*Bond of Indemnity on paying Lost Note.*

Know all men, &c. [*as above*] Whereas the said C. D., on the day of            , 18            , did make, execute, and deliver unto the above bounden A. B., for a valuable consideration, his promissory note, for the sum of one hundred dollars, written due and payable, on or before the            day of            , then next, with interest, which said promissory note the said A. B., since the delivery of the same to him, as aforesaid, has in some manner, to him unknown, lost out of his possession; and whereas the said C. D. hath this day paid unto the said A. B. the sum of            dollars, the receipt whereof the said A. B. doth hereby acknowledge, in full satisfaction and discharge of the said note, upon the promise of the said A. B. to indemnify and save harmless the said C. D. in the premises, and to deliver up the said note, when found, to the said C. D. to be cancelled: Now, therefore, the condition of this obligation is such, that if the above bounden A. B., his heirs, executors, or administrators, or any of them, do and shall, at all times hereafter, save and keep harmless the said C. D., his heirs, executors, and administrators, of, from, and against the promissory note aforesaid, and of and from all costs, dam-

ages, and expenses that shall or may arise therefrom ; and also deliver, or cause to be delivered up, the said note, when found, to be cancelled, then this obligation to be void ; else to remain in full force and virtue.

Sealed, &c. [*as above*].

A. B. [L. s.]

E. F. [L. s.]

*Bond for Performance, to be Endorsed on a Contract.*

Know all men, &c. [*as in foregoing*].

The condition of this obligation is such, that if the above bounden A. B., his executors, administrators or assigns, shall, in all things, stand to and abide by, and well and truly keep and perform the covenants, conditions, and agreements in the within instrument contained, on his or their part to be kept and performed, at the time, and in the manner and form therein specified, then the above obligation shall be void ; else to remain in full force and virtue.

Sealed, &c. [*as in foregoing*].

*Bond to Produce Bill of Lading.*

Know all men by these presents : That we, A. B. & C. D., composing the firm of B. & Co., and E. F. & G. H., of city and county of San Francisco, and state of California, are held and firmly bound unto the owners, master and consignees of the ship Ocean Cable, in the penal sum of twenty thousand dollars, to be paid unto the said owners, master, or consignees, their executors, administrators, or assigns, to which payment, well and truly to be made, we do bind ourselves, our heirs, executors and administrators, firmly by these presents.

The condition of this obligation is such, that, whereas M. & Co., claim to be the true and lawful consignees of certain goods, wares and merchandise, now on board the ship Ocean Cable, of which they hold no valid bill of lading, now, in consideration of the delivery of said goods to the said B. & Co., by M. & Co., the consignees, of said ship Ocean Cable, without presentation of bill of lading : we, the undersigned, hereby agree to furnish to the said consignees of said ship, within ninety days from the date hereof, a proper bill of lading of said goods, duly filled up to the order of said B. & Co., or in default of furnishing such bill of lading, we hereby agree to hold the said owners, master and consignees of said ship, harmless against the claims for delivery of any party or parties whatsoever, and bind ourselves to pay to the said owners, master or consignees, all loss or damage which they may be called upon to pay in consequence of such delivery of said goods to the said B. & Co.

Now, if the said B. & Co., do well and truly fulfil the conditions of the above agreement, then this obligation is to be void and of no effect, otherwise to remain and be in full force and virtue.

In witness whereof, we have hereunto set our hands and seals,  
this                      day of                      eighteen hundred and fifty-nine.

In presence of }  
L. M. }

A. B. [L. s.]  
C. D. [L. s.]  
E. F. [L. s.]  
G. H. [L. s.]

*Bottomry Bond.*

Know all men by these presents: That I, A. B., now master and commander of the ship or vessel called the Hercules, of the burden of one thousand tons, or thereabouts, now lying in the port of                      , am held and firmly bound unto C. D., in the sum of ten thousand dollars, lawful money of the United States of America, to be paid to the said C. D., or to his certain attorney, executors, administrators, or assigns; for which payment well and truly to be made, I bind myself, my heirs, executors and administrators, and also the said vessel, her tackle, apparel and furniture, firmly by these presents. Sealed with my seal, at

this                      day of                      in the year of our Lord one thousand eight hundred and fifty-nine. Whereas the above bounden A. B. has been obliged to take up and borrow, and hath received of the said C. D., for the use of the said vessel, and for the purpose of fitting the same for sea, the sum of ten thousand dollars, lawful money of the United States of America, which sum is to be and remain as a lien and bottomry on the said vessel, her tackle, apparel and furniture, from the port of                      on a voyage to the port of                      , at the rate or premium of                      per cent. for the voyage. In consideration whereof, all risks of the seas, rivers, enemies, fires, pirates, &c., are to be on account of the said C. D. And for the better security of the said sum and premium, the said master, doth by these presents, hypothecate and assign over to the said C. D., his heirs, executors, administrators and assigns, the said vessel, her tackle, apparel, furniture, &c. And it is hereby declared, that the said vessel Hercules, is thus hypothecated and assigned over for the security of the money so borrowed and taken up as aforesaid, and shall be delivered for no other use or purpose whatever; until this bond is first paid, together with the premium hereby agreed to be paid thereon.

Now the condition of this obligation is such, that if the above bounden A. B., shall well and truly pay or cause to be paid, unto the said C. D., or to his attorney legally authorized to re-

ceive the same, his or their executors, administrators and assigns, the just and full sum of one thousand dollars, lawful money as aforesaid, being the sum borrowed, and also the premium aforesaid at or before the expiration of thirty days after the arrival of the said vessel at the said port of \_\_\_\_\_, then this obligation, and the said hypothecation, to be void and of no effect, otherwise to remain in full force and virtue. Having signed and executed these bonds of the same tenor and date, one of which being accomplished, the others to be void and of no effect.

Signed, sealed and delivered } A. B. [L. s.]  
in the presence of E. F. }

*Bond of Indemnity.*

Know all men by these presents: That I, Cornelius Vanderbilt, of the city of New York, in the state of New York, am held and firmly bound unto Albert Dibblee, of the city of San Francisco, in the state of California, in the sum of five thousand two hundred and seventy-five dollars, lawful money of the United States of America, to be paid to the said Albert Dibblee, his executors, administrators or assigns, for which payment, well and truly to be made, I bind myself, my heirs, executors and administrators, finally by these presents. Sealed with my seal. Dated the \_\_\_\_\_ day of January, in the year of our Lord one thousand eight hundred and fifty-eight.

Whereas heretofore, one B. Frederick Moses filed his bill in the District Court of the United States, for the northern district of California, against the steamship Cortes, upon cause of action alleged to have accrued to him in the early part of the year 1856, and whereas such proceedings were afterward had in said cause in said court, that a judgment or decree was made and entered therein, on the 29th day of December, A. D. 1857, that the said Moses do recover in said action the sum of two thousand four hundred and fifty-nine dollars, for his damages therein, and also the sum of one hundred and seventy-one dollars and fifty cents, for his costs of said action, and that the said steamship be condemned and sold to satisfy him for his said damages and costs, and whereas at the time when said alleged cause of action accrued, the above bounden obligor was the mortgagee and owner of the said steamship, and liable ever for the payment of such damages and costs. And whereas an appeal has been taken from the said judgment or decree, to the Circuit Court of the United States for the districts of California, and whereas the said above bounden obligor has applied to the above-named obligee to become one of the sureties in the stipulation to be given on the said appeal, to stay the execution of said decree, and abide the judgment and decree of the appellate, and whereas the said obligee

hath consented to become such surety, upon being indemnified against all loss or damage by reason thereof, and hath executed and acknowledged the necessary stipulations on such appeal.

Now the constitution of this obligation is such, that if the said obligor, the said Cornelius Vanderbilt, and his heirs, executors, and administrators, shall and do at all times hereafter, well and truly save and keep the said obligee, Albert Dibblee, his executors and administrators, harmless of and from all actions, costs, damages and counsel fees, of and from and by reason of or growing out of such suretyship, and shall well and truly repay, or cause to be repaid, to the said obligee, his executors or administrators, on demand, any and all such sum and sums of money that he may be required to pay as such surety as aforesaid, then this obligation to be void; else to remain in full force and virtue.

C. VANDERBILT. [L. s.]

By A. B., his Attorney in fact.

Sealed and delivered in the presence of M. N.

### *Legatee's Bond.*

Know all men by these presents: That we, A. B., principal, and C. D. and O. P., of, &c., are held and firmly bound unto E. F. and L. M., of, &c., executors of the last will and testament of S. T., deceased, late of the town of \_\_\_\_\_, in the sum of one thousand dollars, lawful money of the United States, to be paid to the said E. F. and L. M., executors, as aforesaid, the survivors or survivor, or his or their assigns; for which payment, well and truly to be made, we bind ourselves, our and each of our heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals. Dated the \_\_\_\_\_ day of \_\_\_\_\_, one thousand eight hundred and \_\_\_\_\_

Whereas, in and by the last will and testament of the said S. T., deceased, a legacy of one thousand dollars is bequeathed to the said A. B., which has been paid to him by the said E. F. and L. M., executors as aforesaid:

Now the condition of this obligation is such, that if any debts against the deceased, above named, shall duly appear, and which there shall be no other assets to pay, and if there shall be no other assets to pay other legacies, or not sufficient, then the said A. B. shall refund the legacy so paid, or such ratable proportion thereof, with the other legatees of the deceased, as may be necessary for the payment of such debts, and the proportional parts of other legacies, if there be any, and the costs and charges incurred by reason of the payment of the said A. B.; and that if the probate of the will of the said deceased be revoked, or the

will declared void, then the said A. B. shall refund the whole of the legacy, with interest, to the said E. F. and L. M., their executors, administrators, or assigns.

Sealed, &c. [*as above*].

A. B. [L. s.]

C. D. [L. s.]

O. P. [L. s.]

## CHAPTER X.

## BILLS OF EXCHANGE AND PROMISSORY NOTES.

THESE instruments derive their great practical utility from the qualities and incidents which attach to them in their character of negotiable paper.

By *negotiable paper* is usually meant evidence of debt, which may be transferred by endorsement or delivery, so that the transferee or holder may sue the same in his own name; or, in other words, it means paper, that is, bills of exchange or promissory notes, payable to the order of a payee or to bearer.

By the statute of California, however, all bills and notes negotiable, and all bonds, due bills and other instruments of writing not negotiable, payable in money or articles of personal property, or any sum of money in personal property, are transferable by endorsement; and all alike, negotiable and non-negotiable, must be sued in the name of the real owner. In this state, therefore, a full definition of negotiable paper would be, a bill, or note, or evidence of debt, payable to order or to bearer, or evidence of debt which may be transferred by endorsement or by delivery before maturity *bona fide*, so that the new owner can sue the same in his own name, and recover the face of the instrument, without giving notice of the transfer to the payer, although the payer may have a legal counter-claim against the payee.

The great importance of such paper among business men is derived from the circumstance, that in proportion to its credit, it may be used to pass from hand to hand, serving the purposes of cash; the principle of law being that, if negotiable where made, it is negotiable everywhere.

A bill of exchange is a written order or request, and a promissory note a written promise, by one person to another for



the payment of money at a specified time, absolutely and at all events.

A., who draws the bill, is called the *drawer*; B., to whom it is addressed, is called the *drawee*, and on acceptance he becomes the *acceptor*; C., to whom the bill is made payable, is called the *payee*; X., who makes the note, is called the *maker*; Y., to whom the note is made payable, is called the *payee*.

The instrument is made negotiable when drawn to the order of the payee, or to the payee or order, or to bearer. The payee to order, M., may by endorsement direct the bill or note to be paid to N.; and in that case M. becomes the *endorser*, and N., to whom it is endorsed, is called the *endorsee* or *holder*. He is also called the *assignee*; and if N. endorses to O., then N. is a *subsequent* endorser, and O. is a *subsequent* endorsee, holder, or assignee; and each preceding endorser is liable to the holder for the payment of the bill or note. If he wishes to avoid liability, he should write over his name the words, "*without recourse*."

The usual mode of endorsement is, for the person to whose order the instrument is payable to write his name across the back of it. This is called an endorsement in blank; because it is not endorsed to any particular person, and is good in the hands of any *bona fide* holder, and can be again transferred, without further *endorsement*, by mere delivery.

If he wishes to make it payable to any particular person, A. B., he writes across the back, "Pay to A. B. or order." This is called a special endorsement, because it is good only in the hands of A. B., and cannot be again transferred unless endorsed by A. B.

If the note be drawn to the order of several persons, not co-partners, it must be endorsed by each of such persons upon transfer.

A *guarantor* is one who puts his name on the back of the paper, out of the usual course of regular transfer and negotiability. Under the California decisions, he is liable to pay if the maker does not, provided there has been due presentment made to the maker, and strict notice of non-payment given to the guarantor.<sup>1</sup> See *post*.

<sup>1</sup> 9 Cal. 425; Brady v. Reynolda, January Term, 1859; Geiger v. Clark, et al., April Term, 1859.

A bill or note is not confined to any set form of words. A promise to deliver, or to be accountable, or to be responsible for so much money, is a good bill or note; but it must be exclusively and absolutely for the payment of money, and should be without condition or contingency:

The words "value received" are not essential, and may be omitted, but it is usual to insert them, as banks do not in some places consider paper negotiable without them. The legal effect of the note is the same in either case.<sup>1</sup>

Any thing valuable is a good consideration for the promise.

An endorsement payable to order on a note or bond is a bill of exchange.

The date should be carefully expressed, although, if it were omitted, the paper would be considered to bear date from the time it was made and delivered.

Bills of exchange are called *foreign* when drawn upon a party and place out of this state, and *inland* when between parties within the state.

Checks upon a banker partake of the character of inland bills of exchange.<sup>2</sup>

What are commonly called drafts, orders, and acceptances upon other persons for the payment of money, are in general inland bills of exchange.

Due bills and certificates of deposit are considered in the character of promissory notes.<sup>3</sup>

When the instrument is not drawn or made to order, or to bearer, but to A. B., or is not for the payment of money but for goods, it is binding between the parties and is assignable, but is not a negotiable note except to the following extent:

By the statute of California, bonds, due bills, notes, and other instruments of writing, by which a person promises to pay money or goods to another, although not negotiable, may be assigned by endorsement in the same manner as bills of exchange; but if suit be brought thereon by the holder, the maker can set up in defence, any good offset he may have against the payee, that existed before he received notice of the assignment.<sup>4</sup>

The endorser of such paper, is only liable, provided the holder

<sup>1</sup> 8 Cal. 299.

<sup>2</sup> 8 Kent, 75.

<sup>3</sup> 4 Cal. 137.

Wood's Dig. art. 198, 199.

has brought suit against the maker within sixty days, except where suit would have been unavailing, or the maker has absconded.<sup>1</sup>

When a bill is drawn payable on demand, or at a certain period, say ten days after sight, it should be presented to the party upon whom it is drawn as promptly as may be convenient, for acceptance, that the day of payment may be determined. If accepted, the acceptor should write the acceptance on the face of the bill. The holder should then present the bill for payment, at the end of the time allotted, with the days of grace added, which in the case supposed would be thirteen days; or if on demand, it would be at the end of the days of grace—three days.

If acceptance be refused, the bill should be protested for non-acceptance, and notice should be given to the drawer in order to hold him liable. If it be accepted, but not paid at the proper time, the bill should be protested for non-payment, and notice given as above for the same purpose. If, after acceptance, the bill has been transferred from hand to hand by endorsement, upon protest for non-payment, notice should be given to each of the endorsers, as well as to the drawer, in order to hold them liable also.

The requisites of protest and notice, how, when, and where to demand payment, &c., will be found in this volume under the head of NOTARY.

The same doctrine applies to promissory notes. If the note be drawn to the order of any person, payable at a certain day, say ten days, it should be presented for payment within reasonable hours on the thirteenth day, and if not paid, notice should be given to the endorser, in order to hold him liable; and if there be several endorsers, notice should be given to each one, for the same purpose.

If payable on demand, the demand should be made within a reasonable time; and on the third day thereafter, within reasonable hours, the note should be presented for payment; and on failure of payment, notice should be given to the endorser or endorsers in like manner and for the like object.

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<sup>1</sup> Wood's Dig. art. 200.

It is not necessary to protest a promissory note or inland bill of exchange, although it is usual to do so. A demand of payment, and, upon neglect or refusal, notice to the endorser is all that is requisite.<sup>1</sup>

#### STATUTORY PROVISIONS.

The following provisions in relation to bills and notes are found in the statutes of *California*, *Oregon* and *Washington*.<sup>2</sup>

Promissory notes payable to order or bearer have the same effect and are negotiable, and may be sued on like inland bills of exchange, according to the custom of merchants. Such notes may be signed by agent, if lawfully authorized, and by corporations capable by law of making contracts. Such notes made payable to the maker, or to the order of a fictitious person, shall have the same effect and be of the same validity as against the maker and all persons having knowledge of the facts, as if payable to the bearer. No person within the state or territory shall be charged as an acceptor on a bill of exchange, unless his acceptance shall be in writing, signed by himself or his lawful agent.

The following provisions are found in the statutes of *California* and *Washington only*.

If such acceptance be written on a paper other than the bill, it shall not bind the acceptor, except in favor of a person to whom such acceptance shall have been shown, and who, on the faith thereof, shall have received the bill for a valuable consideration. An unconditional promise, in writing, to accept a bill before it is drawn, shall be deemed an actual acceptance, in favor of a person who, upon the faith thereof, shall have received the bill for a valuable consideration. A refusal to write an acceptance on the bill after request, is a refusal to accept; and the bill may be protested for non-acceptance. A party who has drawn or negotiated a bill on the faith of a previous promise to accept, may recover damages on refusal of the promisor to accept. If a drawer destroy a bill delivered for acceptance, or refuse to return it accepted or non-accepted, for twenty-four

<sup>1</sup> 8 Cal. 686.

<sup>2</sup> Wood's Dig. art. 177, *et seq.*; Statutes Ore-

gon, p. 580, *et seq.*; Statutes Washington, p. 400, *et seq.*

hours, or such longer time as the holder may allow, he shall be deemed to have accepted it.

The provisions of the several statutes in regard to *damages* are as follows :

In *California*, upon protest for non-acceptance or non-payment of bills drawn or negotiated in this state. 1. If drawn upon any person in the United States east of the Rocky Mountains, fifteen dollars upon the hundred upon the principal sum. 2. If drawn upon any person in a foreign country, twenty dollars. If the contents of the bill be expressed in money of account of the United States, the amount due is computed without reference to the rate of exchange; but if expressed in the money of account or currency of any foreign country, the amount is ascertained and determined by the rate of exchange on the value of such currency at the time of the demand for payment.

Such damages are allowed only to a *bona fide* holder for a valuable consideration, and are in lieu of interest and all charges previous to, and at the time of giving notice; but interest may be recovered upon the principal sum and damages from the time of giving notice.

In *Oregon*, upon protest for non-acceptance or non-payment of bills drawn in the state. 1. On any place out of the United States, ten per cent. upon the contents, with interest on the contents from the date of protest, with the addition of the current rate of exchange at the time of the demand. 2. On any place out of Oregon and within the United States, the amount of the bill, with legal interest, according to its tenor, and five per cent. damages, together with costs and charges of protest.

In *Washington*, upon protest for non-payment of bills drawn or endorsed in the territory, if payable without the limits of the United States, ten per cent. upon the contents thereof; if payable within the United States out of the territory, five per cent. on the contents: such damages to be in lieu of interest, charges of protest, and all other charges incurred previous to and at the time of giving notice; but interest upon the amount of the principal sum and the damages may be recovered from the time of giving notice.

Three *days of grace* are allowed in *California*, except on sight bills or drafts, and the *first of January*, the *fourth of July*, and

the *twenty-fifth of December*, for the purposes of presentment, protest and notice, are considered as Sunday. In *Oregon* and *Washington*, grace is allowed on all bills payable at sight, or at a future day certain within the state or territory, and on all promissory notes, orders and drafts, payable at a future day, certain within the state or territory; except that in *Oregon* grace is not allowed on bills, notes or drafts, payable on demand. In *Washington* the *fourth of July* and the *twenty-fifth of December*, for the purposes of protest, &c., are considered as Sunday.

#### JUDICIAL DECISIONS.

When a note is signed by two parties, one of whom writes the word *surety* after his name, both are treated as makers; the word *surety* being of effect only as between the makers.<sup>1</sup>

Such a maker is not guaranteeing another's contract, he is making his own; and cannot show by parol, a different motive from that which appears upon the face of the contract he signs, which is an unconditional contract to pay money; whereas a guarantor or endorser makes only a conditional promise.<sup>1</sup>

The possession of a promissory note, payable to bearer, or endorsed in blank by the payee, whether obtained before or after maturity, is *prima facie* evidence of ownership. The transfer, with or without value, confers upon the holder the right of action, and a consideration need not be proved, unless a defence is interposed which would otherwise preclude a recovery.<sup>2</sup>

An agreement for the extension of the time of payment, if without consideration, is void.<sup>3</sup>

When a note is given with the rate of interest in blank, the holder may insert the rate of interest by consent of the maker. If he insert it without such consent, it is not such an alteration as will make the note void, but the principal and interest at the legal rate may be recovered, an innocent holder, however, could recover the principal and interest expressed.<sup>4</sup>

Giving a note either of the debtor or of a third person, for a pre-existing debt, is no payment, unless it be expressly agreed to

<sup>1</sup> 10 Cal. 332.

<sup>2</sup> 9 id. 244.

<sup>3</sup> 8 id. 109; 6 id. 577.

take the note as payment, and to run the risk of its being paid; or unless the creditor parts with the note, or is guilty of laches in not presenting it for payment in due time. He is not obliged to sue upon it. He may return it when dishonored and resort to his original demand. It only postpones the time of the payment of the old debt until a default be made in the payment of the note.<sup>1</sup>

When a promissory note is payable three months after date, with interest at the rate of        per cent. a month, the interest runs from the date of the note.<sup>2</sup>

In a judgment on a note bearing an agreed amount of interest, the interest is computed as part of the judgment, and the judgment should bear the agreed interest.<sup>3</sup>

A certificate of deposit is a negotiable security, and, as far as negotiability is concerned, must be placed on the same footing as promissory notes.<sup>4</sup>

Where it is alleged that a negotiable security, as, for example, a banker's certificate of deposit has been lost or destroyed, the maker of it has a right to require indemnity against all future claims under it before its payment can be enforced. The best rule is, to require indemnity in all cases, whether the bill or note has been lost or destroyed, notwithstanding its occasional hardship.<sup>5</sup>

Sight checks are sight bills, and by our statute are not entitled to grace. But an order in the nature of a check, payable at a future day, is an inland bill of exchange, and the drawer is entitled to three days' grace and notice of non-payment. In such a case, presentation before the last day of grace, and the immediate commencement of suit on the day of demand and non-payment, are premature.<sup>6</sup>

A negotiable note taken by the holder after maturity, is taken subject to all subsisting equities between the maker and the payee relating to the transaction out of which the note was given, but not such as subsisted between the maker and any intermediate holder.<sup>7</sup>

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<sup>1</sup> 8 Cal. 145; *Griffith v. Grogan*, Jan. Term, 1859.

<sup>2</sup> 8 Cal. 145.

<sup>3</sup> 9 Id. 294; 6 Id. 155.

<sup>4</sup> 4 Id. 87.

<sup>5</sup> Id. 85.

<sup>6</sup> Id. 209.

A negotiable promissory note, the consideration of which is against public policy, when transferred to an innocent holder before its maturity, is purged of the objection and must be enforced.<sup>1</sup>

One who puts his name upon a promissory note, out of the usual course of regular negotiability, is not an endorser; he is a guarantor. And this whether his inscription is in blank, or preceded by the words "I guarantee," &c. Such guarantee is not within the statute of frauds, for the want of a consideration expressed in writing. The contract—the promissory note—imports a consideration, each one who writes his name upon it is a party to it, and each party an original undertaker. The liability of an endorser is a guarantee that he will pay, if the maker does not upon presentment, if he receives due notice.<sup>2</sup>

The liability of the guarantor can only be fixed by notice the same as in case of an endorser. The contract of both is conditional, but the conditions are unlike. The contract of endorsement is primarily that of transfer, the contract of guarantee is that of security.<sup>3</sup>

A promissory note was endorsed by a third person before delivery to the payee. Held, that such endorsement was *prima facie* an accommodation to the payee; but proof that his design was to become a surety or guarantor for the maker, would make him liable to the payee; and default by the endorser with proper averments dispenses with this proof.<sup>4</sup>

When a place of payment is designated in a promissory note, or in the body or acceptance of a bill of exchange, the undertaking of the parties and the legal effect of the contract is, that, if ready at the time and place with the funds, the obligor has so far satisfied the contract, that he cannot be responsible for any future damages, either as costs of suit or interest for delay; not that he is thereby discharged of the debt. The insertion of the place of payment is usually made for the convenience of one of the parties; and is given and received with that understanding and none other.<sup>5</sup>

A note commencing "For value received I promise to pay,

<sup>1</sup> 4 Cal. 821.

<sup>2</sup> 2 Cal. 605.

<sup>3</sup> 2 id. 485; 5 id. 188; Brady v. Reynolds, Jan. Term, 1859.

<sup>4</sup> Montgomery v. Tutt, Jan. Term, 1859.



&c.," and signed by two parties, is joint and several; so also where one signs a note as surety for another.

A note payable in specific articles, is payable at the place where the payee resided at the time of making the note; provided that if the articles are too ponderous or his residence is unknown, then at the residence of the maker.<sup>1</sup>

A party may become an endorser of a bill or note by any mark, whether his initials or other figure or sign, if it be substituted for his name, and he intend to be bound by it.<sup>2</sup>

Bills or drafts payable at sight, given due, or on the face of which there is no time of payment expressed, are immediately due without grace.<sup>3</sup>

One who makes or endorses an accommodation note, is a surety for the party accommodated, and the latter is liable to refund the costs of a suit for collection brought against such maker or endorser.<sup>4</sup>

A person becoming surety on a note must be treated and charged as an endorser.<sup>5</sup>

An endorser may waive demand and notice before maturity of the bill or note endorsed, without any consideration for such waiver.<sup>6</sup>

The dating of a promissory note at a particular place does not make that the place of payment and authorize a demand to be made there to charge the endorser, though it is presumptive evidence that the place mentioned is the residence of the maker.<sup>7</sup>

If a note be endorsed after it is due, the endorser is entitled to demand and notice before he is liable to his endorser. The demand should be made in a reasonable time, and notice of default seasonably given.<sup>8</sup>

In conclusion, the reader is referred for further consideration of the present subject, to the chapter entitled **NOTARY**.

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<sup>1</sup> Wood's Dig. art. 208.

<sup>2</sup> 6 Hill, 443; 1 Denio, 471.

<sup>3</sup> Wheatley v. Strobe, January Term, 1850;

Wood's Dig. 196.

<sup>4</sup> 3 Barb. Sup. Ct. Rep. 684.

<sup>5</sup> 7 Hill, 416.

<sup>6</sup> 1 Comstock, 186.

<sup>7</sup> 8 Denio, 145.

<sup>8</sup> Beebe v. Brooks, January Term, 1850.

## FORMS.

*Bill of Exchange.*

\$10,000.

SAN FRANCISCO, May 1, 1856.

Ten days after sight, pay to the order of Thomas Kensett & Co.,  
ten thousand dollars, and charge the same to account of

D. L. Ross &amp; Co.

To Messrs. WM. T. COLEMAN &amp; Co., New York.

*A Set of Bills of Exchange.*

WELLS, FARGO &amp; Co., Express and Banking Office.

No. 104,901. Ex. for \$10. SAN FRANCISCO, Cal., Aug. 4, 1858.

At sight of this first of exchange (second and third unpaid),  
pay to the order of Morris & Willis, ten dollars.

Valuerceived, and charge the same to account of

WELLS, FARGO &amp; Co.

To Messrs. WELLS, FARGO &amp; Co., 82 Broadway, New York.

WELLS, FARGO &amp; Co., Express and Banking Office.

No. 104,901. Ex. for \$10. SAN FRANCISCO, Cal., Aug. 4, 1858.

At sight of this second of exchange (first and third unpaid),  
pay to the order of Morris & Willis, ten dollars.

Valuerceived, and charge the same to account of

WELLS, FARGO &amp; Co.

To Messrs. WELLS, FARGO &amp; Co., 82 Broadway, New York.

WELLS, FARGO &amp; Co., Express and Banking Office.

No. 104,901. Ex. for \$10. SAN FRANCISCO, Cal., Aug. 4, 1858.

At sight of this third of exchange (first and second unpaid),  
pay to the order of Morris & Willis, ten dollars.

Valuerceived, and charge the same to to account of

WELLS, FARGO &amp; Co.

To Messrs. WELLS, FARGO &amp; Co., 82 Broadway, New York.

*Bank Check.*

No. 387.

SAN FRANCISCO, Nov. 12, 1853.

B. Davidson & Co., pay to S. R. Throckmorton, or order, fifty  
thousand dollars (\$50,000).

SAML. BRANNAN.

*Promissory Note Negotiable.*\$1,000<sup>00</sup>.

SAN FRANCISCO, March 5th, 1857.

Thirty days from date for value received, I promise to pay to

the order of J. C. Horan & Co., one thousand dollars, with interest at two per cent. per month.

D. QUATTLE.

*Another Form.*

\$279<sup>50</sup>/<sub>100</sub>. One month after date for value received, I promise to pay to A. S. Church, or bearer, two hundred and seventy-nine <sup>50</sup>/<sub>100</sub> dollars, with interest after maturity at three per cent. per month.

JAMES BULL.

San Francisco, August 4th, 1855.

*Another Form.*

\$500. SQUAW HOLLOW, May 1, 1858.  
Ninety days from date, I promise to pay to Chas. Plover, or order, five hundred dollars.

ANDREW J. SMART.

*Note not Negotiable.*

\$290. DUTCH FLAT, June 9th, 1856.  
Ten days from date I promise to pay to Elkins Todd, two hundred and ninety dollars—value received.

GEO. PARKS.

*Note Payable on Demand.*

\$1,500. On demand, for value received, I promise to pay to C. W. Kendall, or bearer, one thousand five hundred dollars, with interest from date until paid, at five per cent. per month, compounded.

ABIEL BROWN.

Murderer's Bar, Oct. 10, 1850.

*Note Payable at a Banker's.*

SAN FRANCISCO, Aug. 5, 1858.  
\$5,000<sup>00</sup>/<sub>100</sub>. Ninety days from date, value received, I promise to pay to the order of Jennings and Brewster, at the Banking House of B. Davidson, five thousand dollars.

JOHN YOUNG.

*Note for Loan, to be accompanied by Mortgage.*

SAN FRANCISCO, April 1, 1856.  
\$3,000<sup>00</sup>/<sub>100</sub>. Six months from date, without grace, for value received, I promise to pay to Pyncheon Close, or order, at the Banking House of Sather and Church, three thousand dollars, with interest thereon, at the rate of two and one half per cent. per month, payable monthly in advance, agreeing that upon failure to pay said monthly interest at any time for more than

five days after any day when the same may be due, the whole amount of principal and interest shall at once become due and payable, and further, that such interest may be added to the principal, such aggregate of principal and interest to bear the same rate of interest both before and after judgment until paid; and further, that in the event of a suit to enforce the collection of this note, a counsel-fee of ten per cent. upon the amount of principal and interest due at the time of judgment may be added to and form a part of such judgment.

MARK DASSER.

*Note Secured by Collateral, with Power to Sell.*

ANGEL'S CANON, June 1, 1859.

\$1,000. Ninety days after date, without grace, I promise to pay to the order of R. L. Taylor, at the Banking House of John Parrott, in the city of San Francisco, one thousand dollars, value received, with interest after thirty days until paid, at the rate of two per cent. per month, payable monthly.

I hereby deposit, as collateral security, for the payment of the above note, five shares (\$1,000 each) of the Odic Quartz Mining Co., and I hereby appoint and constitute R. L. Taylor, his heirs or assigns, my attorney irrevocable, with power of substitution, to sell without notice to me the whole or any part of said security, either at public or private sale; the proceeds to be applied to the payment of the above note, interest due, and expenses of sale, in case of non-payment of said note when due; any surplus, after payment of said note, interest and expenses, to be subject to my order. But in case of payment of above note and interest, according to the terms of the former, then this agreement to be void, and the above-named security to be returned to me.

PAUL HARDOP.

*Note Payable by Instalments.*

GREENHORN GULCH, Nov. 3, 1855.

\$300<sup>00</sup>/. For value received, I promise to pay to the Snow Mountain Water Co., one hundred dollars in one month from date, one hundred dollars in forty days from date, and one hundred dollars in fifty days from date, said respective sums to bear legal interest at ten per cent. per annum. HONEST J. MINER.

nmn *Memorandum Note for Money Lent.*

\$50. Borrowed of Wm. Hix, fifty dollars, to be paid when demanded.

Green Briar Gulch, August 5th, 1856.

Witness,  
JEEMS KNIGHT.

SARAH WILLIAMS, her X mark.

*Due Bill.*

\$100. Due Gardner Jenks one hundred dollars for tailings.  
Whiskey Hill, Nov. 1, 1858. SAM SLUICE.

*Draft or Order.*

GRUB FLAT, May 1, 1859.  
MRS. EUNICE STONE:  
Please pay Thomas Cole, or bearer, seventy-five dollars, and  
charge the same to account of JOHN HALIFAX.

*Note Payable in Specific Articles.*

\$1,000. Six months from date for value received, I promise to  
pay to H. S. Austin, or bearer, one thousand dollars, in red-wood  
lumber, of best quality, at the then current market price.  
Redwood City, May 1, 1859. S. B. MARSTON.

## FORMS OF ENDORSEMENT.

1.—*Endorsement in Blank.*

HENRY BAKER.

2.—*Endorsement to a Particular Person.*

Pay to H. B. JARNDYCE.  
HENRY BAKER.

3.—*Endorsement to Avoid Liability.*

Without recourse.  
HENRY BAKER.

4.—*Special Endorsement.*

Pay to the order of MANUEL TORRES.  
HENRY BAKER.

5.—*Endorsement of an Agent.*

HENRY BAKER by his agent.  
D. B. ARROWSMITH.

*Notice of Protest of Bill, or Note, or Check, for Non-Payment.*

SAN FRANCISCO, , 1857.

SIR:—Please take notice that a certain bill of exchange [*or note, or check*], dated May 1, 1857, for five thousand dollars, payable one month from date, drawn by A. B. in favor of C. D. [and accepted by E. F.,] [*or, and endorsed by C. D., G. H., J. K., &c.,*] was this day presented by me, to E. F. [*or, A. B.,*] and payment thereof demanded, which was refused; the said bill [*or note, or check*] having been dishonored, the same was this day protested by me for the non-payment thereof, and the holder looks to you for the payment thereof, together with all costs, charges, interest, expenses, and damages already accrued, or that may hereafter accrue thereon by reason of the non-payment of said bill of exchange [*or note, or check*].

Very respectfully,


your obedient servant,

SAMUEL HERMANN,

Notary Public.

To A. B. [*or C. D., E. F., G. H., &c.*]

For other forms of notice and of protest see under head of  
NOTARY.



## CHAPTER XI.

## CHATTEL MORTGAGE.

## STATUTORY PROVISIONS.

ACT OF MAY 11, 1853, IN RELATION TO PERSONAL MORTGAGES.

SECTION 1. A mortgage for a good and valuable consideration upon possessory claims to public lands, all buildings and improvements upon such lands, all quartz claims, and all other such personal property as shall be fixed in its structure to the soil, acknowledged in manner and form as mortgages upon real estate are required by law to be acknowledged and recorded in the office of the recorder of the county in which the property is situated, shall have the same effect against third persons as mortgages upon real property.

SUPPLEMENT OF APRIL 29, 1857.

SECTION 1. Chattel mortgages may be made on the following property to secure the payment of just indebtedness. Upholstery and furniture used in hotels and public boarding-houses, when mortgaged to secure the purchase-money of the identical articles mortgaged, and not otherwise; mining claims, saw-mill, grist-mill, and steamboat machinery; tools and machinery used by machinists, foundrymen, and other mechanics; steam-boilers, steam-engines, printing-presses, and other printing materials; possessory claims on the lands of the state, with the improvements thereon; quartz claims, with the machinery and buildings connected therewith; water-ditches, flumes, and aqueducts; tunnels, cuts, and other improvements in mining claims; instruments and chests of a surgeon, physician, or dentist, with their professional library, and libraries of all other persons; stock in any incorporated company. No mortgage made by virtue of

this act shall have any legal force or effect (except between the parties thereto), unless the residence of the mortgagor and mortgagee, their profession, trade, or occupation, the sum to be secured, the rate of interest to be paid, when and where payable, shall be set out in the mortgage, and the mortgagor and mortgagee shall make affidavit that the mortgage is *bona fide*, and made without any design to defraud or delay creditors: which affidavit shall be attached to such mortgage.

SEC. 2. All mortgages made in pursuance of this act (with the affidavit attached) shall be recorded in the county where the mortgagor lives, and also in the county where the property is located; *provided*, that property *in transitu* from the possession of the mortgagee to the county of the residence of the mortgagor, or to a location for use, shall, during a reasonable time for such transportation, be considered as located. It shall be the duty of the county recorders of this state to provide proper books of record and of index, in which they shall make a true copy or record of all mortgages made in pursuance of the provisions of this act and left with them for record, and they shall enter, in alphabetical order, the names of the mortgagee and mortgagor in such index books. The recorders shall note on the mortgages and in the index books the time (in like manner as mortgages on real estate) when the same was received into the office for record, and the recording shall take effect from that time. The recorder's fees for recording and indexing shall be the same as are allowed him by law for like services for recording deeds of real estate, to be paid in advance by the person presenting the same for record.

SEC. 3. No chattel mortgage shall be valid (except between the parties thereto) unless the same shall have been made, executed, and recorded in conformity to the provisions of this act; *provided, however*, if the mortgagee receives and retains the actual possession of the property mortgaged, he may omit the recording of his mortgage during the continuance of such actual possession.

SEC. 4. A right of redemption shall remain in the mortgagor until the same shall have been foreclosed by due process of law, or by agreement between the parties to the mortgage; which agreement shall be entered on the record of the mortgage, and for



the entering of which the recorder shall be entitled to the same rate of fees as for recording the original, to be paid in advance by the parties to the mortgage.

SEC. 5. All property mortgaged in pursuance of the provisions of this act may be attached at the suit of the creditors of the mortgagor or mortgagee. When attached at the suit of the creditor of the mortgagor, such creditor shall pay or tender to the mortgagee the actual amount due him on such mortgage, before the officer making such attachment shall be entitled to the actual possession of such property. When property thus situated, and thus redeemed, shall have been sold by the officer by virtue of due legal proceedings, out of the proceeds of the sale he shall: 1. Pay to the creditor the amount advanced by him to pay the mortgagee, with legal interest thereon. 2. Pay all legal costs and fees appertaining to the judgment, execution, and sale. 3. Pay the judgment creditor the amount of the judgment, and any remaining surplus pay to the judgment debtor. If the creditor of the mortgagor prefers, he may cause to be attached the right of redemption of said mortgagor, and cause the same to be sold, subject to the rights of the mortgagee. Such attachment shall be made by leaving a copy of the writ of attachment, with notice of the attachment, with the mortgagee. When a sale of such equity is made on an execution obtained by such attaching creditor, the sum realized shall be applied to the payment of costs, fees, discharge of the execution, and any remainder paid to the judgment debtor. When the interest of the mortgagee shall be attached, a copy of the writ of attachment shall be left with the mortgagor, with notice of the attachment; and any payment made by him to the mortgagee after such notice, shall not release the attachment or affect the rights of the attaching creditor; but said mortgagor may pay the amount due on said mortgage to the officer who made the attachment, and thereupon said officer shall release said attachment, and hold the money so paid him in the same manner as if he had originally attached said money.

SEC. 6. This act shall not be so construed as to interfere or conflict with the lawful mining rules, regulations, or customs in regard to the locating, holding, or forfeiture of claims, but in all cases of mortgages of mining interests under this act, the mort-

gagee shall have the right to perform the same acts that the mortgagor might have performed for the purpose of preventing a forfeiture of the same under the said rules, regulations, and customs of mines, and shall be allowed such compensation therefor as shall be deemed just and equitable by the court ordering the sale upon a foreclosure; *provided*, that such compensation shall in no case exceed the amount realized from the claim by a foreclosure and sale.

SEC. 7. The mortgagee in all mortgages made under this act, shall be allowed one day for every twenty miles of the distance between his residence and the county recorder's office, where such mortgage ought by law to be recorded to conform to the provisions of this act, before any attachment shall be valid, made by the creditors of the mortgagor.

SEC. 8. Mortgages may be made on all kinds of water craft of five tons' burden or upward, custom-house measurement, whether propelled in whole or in part by steam or wind; *provided*, that the requirements of the preceding sections are complied with; *and provided, further*, that an endorsement shall be made on the custom-house register or enrolment of such vessel, showing the amount for which the same is mortgaged, and the place, book and page where the same is recorded: *and provided, also*, that this section shall not be construed to affect or impair, in any way whatever, maritime liens.

AMENDMENT OF 1856.

No mortgage of personal property hereafter made shall be valid against any other person than the parties thereto, unless possession of the mortgaged property be delivered to, and retained by, the mortgagee; *provided*, that a mortgage upon growing crops, executed, acknowledged and recorded, like mortgages upon real estate, shall be valid as against third parties, without such delivery of possession; but the lien of such mortgage shall cease as against subsequent purchasers, unless possession of such crops, when harvested, be delivered to the mortgagee, as required in other cases of mortgage of personal property.

## FROM REVENUE ACT OF 1857.

SEC. 67. When personal property is under mortgage, or in any manner pledged, it shall, for the purposes of taxation, be deemed the property of the party having possession thereof.

See subjects entitled ASSIGNMENTS and BILL OF SALE.

## JUDICIAL DECISIONS.

Where a lease is assigned as security for a note, it is a pledge, and not a mortgage. The "*pledgee*" does not take the legal title by the assignment, or by failure of the "*pledgor*" to pay the note; but he has the right to collect the rents, and apply them on the note, and is responsible for the surplus.<sup>1</sup>

A pledgee has no right to sell until after demand and notice; and if he sells without demand and notice, to a party having full knowledge of his title, no absolute title passes, and the property remains in the hands of the purchaser, as a pledge.<sup>1</sup>

A party, by pledging negotiable securities transferable by delivery, loses all right to the securities, where transferred by the pledgee in good faith to a third party.<sup>2</sup>

The pledgee in such a case should be treated in the transaction as the agent of the owner, and the owner should be bound by his act in the premises.<sup>2</sup>

A pledge is a bailment which is reciprocally beneficial to both parties, and therefore the law requires of the pledgee the exercise of ordinary diligence in the custody and care of the goods pledged, and he is responsible for ordinary negligence.<sup>2</sup>

When the bailors agreed that the goods should be stored in a certain warehouse at their risk and expenses, *Held*, that their removal by an agent of the bailees, though without their knowledge, charged them for the safe-keeping of the goods after their removal, and that they were responsible for any damage to said goods caused by their removal to an insecure or improper place of storage.<sup>2</sup>

<sup>1</sup> 8 Cal. 145.

26 Id. 643.

<sup>2</sup> 5 Id. 290.

## OREGON.

Every mortgage of goods and chattels shall cease to be valid as against the creditors of the person making the same, or subsequent purchasers or mortgagors in good faith, after the expiration of one year from the filing of the same, or a copy thereof, with the Recorder, unless within thirty days next preceding the expiration of the year, the mortgagee, his agent or attorney, shall make and annex to the instrument or copy on file, as aforesaid, an affidavit, setting forth the interest which the mortgagee has, by virtue of such mortgage, in the property therein mentioned, upon which affidavit the Recorder shall endorse the time when the same was filed.<sup>1</sup>

The effect of any such affidavit shall not continue beyond one year from the time when such mortgage would cease to be valid as against the creditors of the person making such mortgage, or subsequent purchasers or mortgagees, in good faith; but within thirty days next preceding the time when any such mortgage would otherwise cease to be valid as aforesaid, a similar affidavit may be filed and annexed, as provided in the preceding section, and with like effect.

The statutes of *Washington* make no special provision in reference to chattel mortgages. See, in this work, chapters on ASSIGNMENT and BILL OF SALE.

## FORMS.

*Chattel Mortgage—for Furniture.*

This indenture, made this thirtieth day of April, in the year of our Lord one thousand eight hundred and fifty-nine, between John Doe, whose residence is at Angel's Camp, county of Calaveras, in the state of California, and who is by profession, trade or occupation, a hotel keeper, party hereto of the first part, and Richard Roe, whose residence is at Sacramento, in the county of Sacramento, in said state, and who is by profession, trade or occupation, a furniture dealer, party hereto of the second part, witnesseth, that the said party of the first part, for and in consideration of the sum of three thousand dollars, to him in hand paid by said party of the second part, the receipt of which is

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<sup>1</sup> Statutes O. p. 598.

hereby acknowledged, hath bargained, sold, assigned, transferred and set over, and by these presents doth bargain, sell, assign, transfer and set over, unto the said party of the second part, the following described articles of furniture, being the identical articles for the purpose of securing the purchase money of which they are herein mortgaged [*here insert schedule, or refer to schedule attached*]; the said goods and chattels above mentioned and described being now in the hotel kept by said party of the first part, in said town of Angel's Camp, to have and to hold all and singular the said goods and chattels above bargained and sold, or intended so to be, unto the said party of the second part, his executors, administrators and assigns, forever. Provided, nevertheless, and this present indenture is upon this express condition, that if John Doe, the said party of the first part, his executors, administrators or assigns, shall well and truly pay unto the said party of the second part, his executors, administrators or assigns, the sum of three thousand dollars, on the thirtieth day of July, at the Banking House of Thos. S. Fiske and Co., in the city and county of Sacramento, in this state, and shall further pay unto the said party of the second part, his executors, administrators or assigns, interest upon the said principal sum at and after this date, at the rate of two per cent. per month, on the thirtieth day of each month, at said Banking House of Thomas S. Fiske and Co., in the said city and county, until the said principal sum be fully paid and discharged, then these presents shall be void. But in case default shall be made in the payment of the said principal sum above mentioned, or any one of said instalments of interest, then it shall and may be lawful for, and he the said party of the first part doth hereby authorize and empower the said party of the second part, his executors, administrators or assigns, with the aid and assistance of any person or persons, lawfully to enter his dwelling-house, hotel, store and other premises, and such other place or places as the said goods or chattels are or may be placed, and take and carry away the said goods and chattels, and sell and dispose of the same for the best price they can obtain by due process of law, or by agreement between the parties to this mortgage, their executors, administrators or assigns, which agreement shall be entered on the record of this mortgage; and out of the money arising therefrom, to retain and pay the said sum above mentioned, with interest as aforesaid, and all charges touching the same, and counsel-fees, not to exceed five per cent. upon the full amount which shall then be due, rendering the overplus, if any, unto the said party of the first part, or to his executors, administrators, or assigns. And until default be made in the payment of the said sum of money, said party of the first part may remain and con-

tinue in the quiet and peaceable possession of the said goods and chattels, and full and free enjoyment of the same.

In witness whereof, the said party hath hereunto set his hand and seal, the thirtieth day of April, one thousand eight hundred and fifty-nine. (Signed) JOHN DOE. [L. s.]

Signed, sealed, and delivered in the presence of A. N.

State of California, }  
County of Calaveras, } ss:

John Doe, the mortgagor in the foregoing mortgage named, and Richard Roe, the mortgagee in said mortgage named, being severally duly sworn, each for himself doth depose and say, that the aforesaid mortgage is *bona fide*, and made without any design to defraud or delay creditors.

(Signed) JOHN DOE.

RICHARD ROE.

Subscribed and sworn to before me, this 30th day of April, 1859. J. B., Notary Public.

*Chattel Mortgage, on Mining Claims, Flumes, Tunnels, &c.*

This indenture, made this thirtieth day of April, in the year of our Lord one thousand eight hundred and fifty-nine, between John Doe, whose residence is at Grass Valley, county of Nevada, in the state of California, and who is by profession, trade or occupation, a quartz mill proprietor and operator, party hereto of the first part, and Richard Roe, whose residence is at the city and county of San Francisco, in said state, and who is by profession, trade or occupation a banker, party hereto of the second part, witnesseth, that the said party of the first part, for and in consideration of the sum of one hundred dollars, lawful money of the United States of America, to him in hand paid, by said party of the second part, the receipt whereof is hereby acknowledged, hath granted, bargained, sold, assigned, transferred and set over, and by these presents doth grant, bargain, sell, assign, transfer and set over, unto the said party of the second part, and to his heirs and assigns, forever, all and singular, [*here insert description of quartz claims, with the machinery and buildings connected therewith, or, water ditches, flumes and aqueducts, or, tunnels, cuts and other improvements in mining claims, &c., &c.*] [*In mortgages of steamboats or other water craft, insert copy of the enrolment from custom-house.*] To have and to hold the above mentioned and described premises, together with all and singular the tenements, hereditaments, franchises, rights, privileges, implements, tools, buildings, machinery, and other

property and appurtenances thereunto belonging or in anywise appertaining.

Provided nevertheless, and these presents are upon this express condition, that if the said party of the first part, his heirs, executors, administrators or assigns, shall well and truly pay or cause to be paid, unto the said party of the second part, his executors, administrators or assigns, the sum of one hundred dollars, on the thirtieth day of July, A. D. 1859, at the banking house of Fretz & Ralston, in the city and county of San Francisco, state aforesaid, with interest thereon at the rate of three per cent. per month from the date hereof, until paid, according to the true intent and meaning of a certain promissory note, a copy of which is as follows: [*here insert copy of note,*] then these presents shall be void. But in case default be made in the payment of the principal sum or interest, as above provided, then the said party of the second part, his executors, administrators or assigns, are hereby authorized and empowered to sell the premises above described, with all and every of the appurtenances, in the manner and form prescribed by law, or by an agreement between the parties to this mortgage, which agreement shall be entered on the record of this mortgage, and out of the money arising from such sale to retain the said principal sum and interest, together with the costs and charges of making such sale, and counsel-fees not to exceed five per cent. upon the full amount which shall then be due, the overplus, if any there be, to be paid unto the said party of the first part, his heirs, executors, administrators or assigns.

In witness whereof, the said party of the first part, hath hereunto set his hand and seal the day and year first above written.

(Signed) JOHN DOE. [L. S.]

Signed, sealed and delivered }  
in presence of E. F. }

State of California, }  
City and County of San Francisco, } ss :

John Doe, the mortgagor, in the foregoing mortgage, named and Richard Roe, the mortgagee in said mortgage, being severally duly sworn, each for himself doth depose and say, that the aforesaid mortgage is *bona fide*, and made without any design to defraud or delay creditors.

(Signed) JOHN DOE.

RICHARD ROE.

Subscribed and sworn to, before me, }  
this 30th day of April, 1859. }  
W. D. W. WIGGINS, Notary Public. }

*Chattel Mortgage of Vessel.*

[For the transfer part proceed as in the foregoing, and conclude as follows:] Provided always, and these presents are upon the express condition, that if I, the said party of the first part shall well and truly pay, or cause to be paid unto the said party hereto of the second part, the just and full sum of \_\_\_\_\_, with the interest thereon secured, to be paid by my certain promissory note in the words and figures following, to wit: [*here insert note*] at the time and in the manner mentioned in said promissory note, and also pay the further sum of \_\_\_\_\_ dollars per month, in each and every month from and after the date of these presents, as an indemnity to him for the expenses of keeping said steamboat or vessel insured from loss or damage by fire or other casualty, then these presents shall be void, otherwise of force. But if default shall be made in the payment of the said several sums of money above mentioned, or of the interest according to the terms of said promissory note, from thenceforth it shall be lawful for said party of the second part, to consider the said promissory note as immediately due and payable, and to sell and dispose of the said steamboat or vessel absolutely, for cash or on credit, at public auction, in the city of San Francisco, or elsewhere, where she may then be, without any personal notice to me of the time and place of sale or intention to sell, by giving six days' previous notice of the time, place, and terms of sale, by advertising the same for six days successively in the San Francisco Herald, or such other newspaper as he may select; and as my attorney for that purpose hereby authorized and appointed, to make and deliver to the purchaser thereof a good and sufficient bill of sale of said steamboat or vessel, and out of the proceeds of sale to retain the amount of principal and interest, and other moneys which may be due to him hereunder, together with the costs, and expenses, and charges of sale, including auctioneer's fees at the rate of ten per cent. upon the amount secured to be paid by said promissory note, returning me the overplus, if any. And I do hereby agree, that until the moneys hereby secured shall be fully paid, the said \_\_\_\_\_, the party hereto of the second part, shall have and be entitled to the full and complete possession and control of the said steamboat or vessel.

In witness, &c. [*For execution see preceding forms and the statute.*]

*Chattel Mortgage for Oregon.*

This indenture, made the \_\_\_\_\_ day of, &c., between A. B. of, &c., of the first part, and C. D., of, &c., of the second part, witnesseth: That the said party of the first part, in consideration of



the sum of                      dollars, to him duly paid, hath sold, and by these presents doth grant and convey to the said party of the second part, and his assigns, the following described goods, chattels, and property [*describe them particularly or refer to them in the schedule, to be annexed, signed by the mortgagor*], now in my possession at the town of                      aforesaid, together with the appurtenances, and all the estate, title, and interest of the said party of the first part therein. This transfer is intended as a security for the payment of five hundred dollars, with interest, on or before the expiration of one year from the date hereof, and the additional sum of one hundred dollars, with interest, on the day of                      , 1860, which payments, if duly made, will render this conveyance void. [*The following clause may be added, if necessary:*] And it is agreed that, until default by the party of the first part in the performance of the conditions aforesaid, it shall and may be lawful for him to keep possession of the property above mentioned and described, and to use and enjoy the same; but if the said party of the first part shall attempt to sell the same, or any part thereof, or to remove the same out of the county of                      without notice to the said party of the second part, or his assigns, and without his or their assent to such sale or removal, to be expressed in writing, then it shall be lawful for the said party of the second part, or his assigns, to take immediate possession of the whole of said property to his or their own use.

In witness whereof, the said party of the first part hath hereunto set his hand and seal, the day and year first above written.

Signed, sealed, and delivered, } A. B. [L. s.]  
in presence of W. P. T. }

*Affidavit to Chattel Mortgage in Oregon (to be made by Mortgagee, his agent, or attorney, and annexed to the instrument or copy on file, within thirty days next preceding the expiration of the year).*

State of Oregon, }  
County of Multnomah, } ss:

C. D., the mortgagee [*or E. F., the assignee of C. D., the mortgagee, or G. H., the agent or attorney of C. D., the mortgagee*] named in the annexed [*or within*] mortgage [*or copy mortgage*], being duly sworn, says, that he is still the owner of said mortgage, and that there is due to him thereon the sum in said mortgage named, to wit, one hundred dollars, which sum constitutes the interest which deponent has in the property mentioned in said mortgage.

Sworn to before me, June 7, 1859.

C. D.

M. N., Justice of the Peace.

*Notice of Sale on Chattel Mortgage for Oregon.*

## MORTGAGE SALE.

By virtue of a chattel mortgage executed by A. B. to C. D., dated the       day of       , 18       , and filed in the office of the recorder of the county of       , on the       day of       , in the year aforesaid, and upon which default has been made, I shall sell the property therein mentioned and described, viz. [mention the articles], at public auction, at the house of       , in the city [or, town] of       aforesaid, on the       day of       instant [or, next], at ten o'clock in the forenoon of that day.

Dated at       , the       day of       , 18       .  
C. D., Mortgagee,  
[or, E. F., Assignee].

## CHAPTER XII.

## CLERKS.

## STATUTORY PROVISIONS.

THE county clerk is chosen by the electors of the county, to serve for two years, and enters upon the duties of his office on the first Monday of October subsequent to his election.<sup>1</sup>

He is required to keep his office at the county seat of the county; and take charge of, and safely keep, or dispose of, according to law, all books, papers and records, which may be filed or deposited in his office.<sup>2</sup> . . .

In *San Francisco* he is required to keep his office open for the transaction of business on all judicial days (Sunday, New Year's Day, the Fourth of July, Christmas and Thanksgiving Days, being non-judicial days), during the following hours: from March 20th to September 20th, from nine A. M. to five P. M., and the remainder of the year from ten A. M. to four P. M.<sup>3</sup>

In some counties the county clerk has the additional duties of other officers, as county auditor and county recorder, and in some counties he is clerk of the board of supervisors.

Beside being clerk of the county court, he is made by statute *ex officio* clerk of the District Court, the Probate Court, and the Court of Sessions of his county; and he is required, either in person or by depnty, to attend each term of either of said courts held in his county.<sup>4</sup>

He shall issue all writs and process required to be issued from any court of which he is clerk; he shall enter, under the directions of the court, all orders, judgments, and decrees proper to be entered; and shall keep in each of said courts a docket, in which

<sup>1</sup> Wood's Dig. art. 2861.

<sup>2</sup> Id. 280.

<sup>3</sup> Laws 1856, p. 148; Wood's Dig. 704.

<sup>4</sup> Wood's Dig. art. 274, 279, and 1269; Const. art. vi. § 7.

shall be entered the title of each cause, with the date of its commencement, a memorandum of every subsequent proceeding in said cause, with the date thereof, and a list of all the fees charged in the cause, and shall keep such other books of record as may be required by law or by the rules of the court.<sup>1</sup>

Each county clerk may appoint one or more deputies, who shall have the same power, in all respects, as their principal. The appointment shall be in writing, and signed by the county clerk, and shall be filed in the office of the recorder of the county; he may revoke the appointment of any deputy at will, by writing, filed in the same office. Each deputy, before entering on his duties, shall take the oath of office, which shall be endorsed on his appointment.<sup>2</sup>

The county clerk may take from each of his deputies a bond, with sureties for the faithful performance of his duties; but the clerk and the sureties on his official bond shall be liable for all the official acts of each deputy.<sup>3</sup>

All process issued by any deputy clerk shall be issued in the name of the principal.<sup>4</sup>

No clerk or deputy clerk shall be permitted to practise as an attorney or counsellor at law in any action or proceeding in any court whatever; for violating the provisions of this section he shall be deemed guilty of a misdemeanor.<sup>5</sup>

Authority is given to him as clerk to take and certify acknowledgments. He is also authorized to administer oaths and affirmations,<sup>6</sup> and to certify the attestations of certain officers.

By various statutory enactments, other duties fall under the province of the county clerk. He receives the election returns of his county, estimates the vote, issues certificates of election, and makes report to the secretary of state.<sup>7</sup> He is required to certify to the governor certain vacancies in office,<sup>8</sup> also, to notify the governor of applications made under the act concerning applications for pardon of criminal offences.<sup>9</sup> It is his duty to assist in the drawing of jurors,<sup>10</sup> to record the bonds of public

<sup>1</sup> Wood's Dig. art. 281.

<sup>2</sup> Id. 278.

<sup>3</sup> Id. 284.

<sup>4</sup> Id. 1157 and 1175; See chapter on ACKNOWLEDGMENTS

<sup>5</sup> Wood's Dig. art. 2144-2153.

<sup>6</sup> Id. 2875 and 2898.

<sup>7</sup> Id. 2902-2904.

<sup>8</sup> See chapters on JURORS, OFFICERS, CORPORATIONS.

officers, that are required by law to be filed in his office,<sup>1</sup> to record certificates of incorporation of religious and benevolent associations,<sup>2</sup> to file with the county recorder for registry, a statement of any decree of divorce granted, or any letters testamentary, or of administration issued,<sup>3</sup> and to furnish certified copies of papers or records under his charge. The records of a justice of the peace of the county are deposited with him, when a vacancy in that office occurs,<sup>4</sup> and upon the filing of a transcript of judgment from a justices' court, he may be required to docket such judgment in the county court judgment docket, and issue execution thereon into any other county of the state.<sup>5</sup> He is also required to deliver the writ of *habeas corpus* to the sheriff, or other ministerial officer of the court, when the writ is directed to such officer,<sup>6</sup> and to furnish a bill of items of any fees charged by him when demanded.<sup>7</sup> He is entitled to charge fees, as regulated by law, except in a few instances, for all services required of him; nor can he be compelled to perform any service, until the fees fixed by law for such service have been paid or tendered to him. For the collection of any fees due him for services rendered, he may have execution in his own name against the party for whom the services were performed.<sup>8</sup>

The following sections of the act in relation to proceedings in civil cases as amended,<sup>9</sup> contain the statutory provisions in regard to sealing and certifying records.

SEC. 449. A judicial record of this state or of the United States may be proved by the production of the original, or a copy thereof, certified by the clerk or other person having the legal custody thereof, under the seal of the court, to be a true copy of such record.

SEC. 450. The records and judicial proceedings of the courts of any other state of the United States may be proved or admitted in the courts of this state by the attestation of the clerk and the seal of the court annexed, if there be a seal, together with a certificate of the judge, chief-justice or presiding magistrate, as the case may be, that the said attestation is in due form.

<sup>1</sup> See chapters on JURORS, OFFICERS, CORPORATIONS.

<sup>2</sup> Laws 1859, p. 108.

<sup>3</sup> Prac. Act, 6-7.

<sup>4</sup> Id. 59.

<sup>5</sup> Wood's Dig. art. 2551.

<sup>6</sup> Id. 2470.

<sup>7</sup> Id. 2466.

<sup>8</sup> Id. 1181-1187.

SEC. 451. A judicial record of a foreign country may be proved by the production of a copy thereof, certified by the clerk, with the seal of the court annexed, if there be a clerk and seal; or by the legal keeper of the record, with the seal of his office annexed, if there be a seal, to be a true copy of such record; together with a certificate of a judge of the court that the person making the certificate is the clerk of the court, or the legal keeper of the record, and in either case that the signature is genuine and the certificate in due form; and also, together with the certificate of the minister or ambassador of the United States, or of a consul of the United States in such foreign country, that there is such a court, specifying generally the nature of its jurisdiction, and verifying the signature of the judge and clerk or other legal keeper of the record.

SEC. 452. A copy of the judicial record of a foreign country shall also be admissible in evidence upon proof: 1. That the copy offered has been compared by the witness with the original, and is an exact transcript of the whole of it. 2. That such original was in the custody of the clerk of the court or other legal keeper of the same: and 3. That the copy is duly attested by a seal, which is proved to be the seal of the court where the record remains, if it be the record of a court; or, if there be no such seal, or if it be not a record of a court, by the signature of the legal keeper of the original.

SEC. 453. Printed copies, in volumes of statutes, code or other written law, enacted by any other state or territory or foreign government, purporting or proved to have been published by the authority thereof, or proved to be commonly admitted as evidence of the existing law in the courts and judicial tribunals of such state, territory or government, shall be admitted by the courts and officers of this state on all occasions as presumptive evidence of such laws.

SEC. 454. A seal of a court or public office, when required to any writ or process or proceeding, or to authenticate a copy of any record or document, may be impressed with wax, wafer, or any other substance, and then attached to the writ, process or proceeding, or to the copy of the record or document, or it may be impressed on the paper alone.

A copy of any record, document or paper in the custody of a

public officer of this state or of the United States, within this state, certified under the official seal, or verified by the oath of such officer to be a true, full and correct copy of the original in his custody, may be read in evidence in any action or proceeding in the courts of this state, in the like manner and with the like effect as the original could be if produced.

Whenever the public records, books or papers in the custody of any collector of customs of the United States, or of the register or receiver of any land-office of the United States, in this state, or in the office of the surveyor-general of the United States for the state of California, or in the office and in the custody of the clerk of the circuit or any district court of the United States for the state of California, shall be required as evidence in any court of this state, copies of such records, books or papers, duly certified by the proper officer, under his hand and official seal, where he has a seal, shall be received in evidence with the same force and effect as the originals.

## FORMS.

*Forms of Oath.\**

You do solemnly swear that, &c. So help you God.

You do swear in the presence of the ever-living God [or, of almighty God], that, &c.

*Form of Affirmation.*

You do solemnly, sincerely, and truly declare and affirm that, &c.

*Assent to Oath or Affirmation.*

I do.

*Oath of Foreman of the Grand Jury.*

You, as foreman of the grand jury, shall diligently inquire into, and true presentment make, of all public offences against the people of this state, committed or triable within this county, of which you shall have or can obtain legal evidence. You shall present no person through malice, hatred, or ill-will, nor leave

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\* When a person is sworn who believes in any other than the Christian religion, he may be sworn according to the peculiar ceremonies of his religion, if there be any such.

any unrepresented through fear, favor, or affection, or for any reward, or the promise or hope thereof, but in all your presentments you shall present the truth, the whole truth, and nothing but the truth, according to the best of your skill and understanding. So help you God.

*Oath of the other Grand Jurors.*

The same oath which your foreman has now taken before you on his part, you, and each of you, shall well and truly observe on your part. So help you God.

*Oath, as to Excuse of Juror.*

That you will well and truly answer the questions put to you concerning your excuse to serve as a grand [or, trial, as may be] juror. So help you God.

*Oath of Triers, on Challenge to Juror for Actual Bias.*

That you will truly inquire whether or not the several persons challenged, or who may be challenged, as trial jurors in this issue joined, between , plaintiff, and , defendant [or, between the people, &c.], and in respect to whom the challenges shall be given to you in charge, are biased against the challenging party, and decide the same truly according to the evidence. So help you God.

*Finding of the Triers.*

We find [or, the majority of the triers find] the challenge true [or, not true].

*Oath as to Competency of Juror.*

That you will well and truly answer such questions as may be put to you concerning your competency to serve as a trial juror in this issue pending between A. B., plaintiff [or, the people of the state of California, complainants], and C. D., defendant. So help you God.

*Oath of Empanelled Jury.*

You, and each of you, do solemnly swear, that you will well and truly try this matter at issue, wherein A. B. is plaintiff [or, the people of, &c., as above, are complainants], and C. D. is defendant, and a true verdict render therein according to the evidence. So help you God.



*Oath of Interpreter.*

That you will well and truly interpret between the court, the jury, the counsel, and the witness [*or*, the witnesses], in this cause, wherein is plaintiff and is defendant. So help you God.

*Another Form.*

That you will well and truly interpret from French into English, and from English into French, the testimony to be given by this witness [*or*, the witnesses], in this issue pending between plaintiff, and , defendant. So help you God.

*Oath on Voir Dire.*

You do solemnly swear that you will true answers make to such questions as may be put to you touching your interest in the event of this cause between A. B., plaintiff [*or*, the people of the state of California, complainants], and C. D., defendant. So help you God.

*Oath of a Witness.*

That the evidence you shall give in this issue pending between , plaintiff [*or*, complainants], and , defendant, shall be the truth, the whole truth, and nothing but the truth. So help you God.

*Oath of Party, or Interested Witness, to Admit Evidence of the Contents of a Paper not Produced.*

That you will true answers make to such questions as shall be put to you touching the power or control you have over any paper [*or*, the loss or destruction of any paper] which would be proper evidence in this cause. So help you God.

*Of a Party, or Interested Witness, Preliminary to Proving the Handwriting of a Subscribing Witness.*

That you will true answers make to such questions as shall be put to you touching your [*or*, the plaintiff's, *or*, defendant's], ability to procure the attendance of G. H., a subscribing witness to this paper [*or*, the paper in question]. So help you God.

*Of Officer, on Retiring with a Jury, or Jurors, on Leave.*

That you will retire with such jurors as will have leave of absence from this court; you will not speak to them yourself in relation to this trial nor suffer any person to speak to them; and you will return with them without delay. So help you God.

*Of Officer to keep Jury on an Adjournment.*

That you will retire with the jury to some convenient room during the recess of court; you will not suffer any person to speak to them, nor speak to them yourself in relation to this trial, and return with them at the order of the court. So help you God.

*Oath of Officer to take Charge of the Jury on Retiring to Deliberate.*

That you will keep this jury together in a private and convenient place for their deliberation; that you will not permit any person to speak to them, nor speak to them yourself, without leave of the court, unless it be to ask them whether they have agreed upon a verdict, and that you will return them into court when they have so agreed. So help you God.

*Form of Taking a Verdict.*

COURT.—Mr. Clerk. Call the jury.

CLERK.—Gentlemen of the jury: please answer to your names as called [*call them one by one, the sheriff counting as they answer*]. Gentlemen of the jury: have you agreed upon your verdict?

JURY.—[*The foreman, rising, answers*] We have.

CLERK.—Declare your verdict.

FOREMAN.—We find [*here state the finding*].

COURT.—Mr. Clerk, record the verdict.

CLERK.—[*The Clerk then enters the verdict and continues,*] Gentlemen of the Jury, listen to your verdict as it stands recorded. You say you find [*here state the finding*]. So say you all.

## FORMS OF VERDICT.

*In a Criminal Case on issue of Guilty or Not Guilty.*

We find the defendant guilty [*or, not guilty*], as charged in the indictment.

*In a Criminal Case, when the question of the Sanity of the Defendant is tried.*

We find the defendant sane [*or, insane*], and that he was so at the time of the alleged commission of the larceny [*or other act, as may be*] charged against him, to wit, on &c.

*Upon a Plea of a Former Conviction or Acquittal of the Same Offence.*

We find for the People [*or*, for the defendant].

A special verdict need not be in any particular form—it must intelligibly present the facts found by the jury. It must be reduced to writing by the jury, or in their presence entered upon the minutes of the court, read to the jury, and agreed to by them before they are discharged.

*Special Verdict, where Defendant is under fourteen years of age, rendered in San Francisco, under the Act in relation to the Industrial School.*

We find that the defendant is under the age of fourteen years, and that he has committed an act which, if committed by a person of responsible age, would warrant a conviction of the offence alleged in the indictment.

*Special Verdicts in Probate Matters, certified to the District Court for Jury Trial.*

In answer to the question, Is C. B., the person styling herself Sarah Hope, in the opposition to the issuance of letters of administration, the surviving wife of Bartemas Hope, deceased? We say, Yes.

We find that the said promissory note was *not* made and executed by the intestate, Alexander Broom, in his lifetime and delivered to the said Peter Joram, for a valuable consideration, and that said promissory note is not a valid claim against the said estate.

VERDICTS IN CIVIL CASES.

*In Action for Damages.*

We find for defendant, [*or*, for plaintiff, damages \$ ;  
or, for plaintiff against defendant, C. D., damages \$  
and verdict for the defendant E. F.]; [*or, if it be a special verdict,*  
*insert the same at length.*]

*Verdict, with Assessment of Value of Personal Property.*

We find, [*as in the preceding forms, and then add:*] and the jury assess the value of the said [*mention the property in ques-*

tion] at                      dollars. [*If necessary add: and they further assess the damages of the said defendant by occasion of the delivery and detention of the said property, at                      dollars.*]

*Verdict where Personal Property is in Question.*

We find the title of the horse in question to be in the plaintiff, and assess the value thereof at one hundred dollars.

*In Cases of Lunacy, &c.*

We find that A. B. is a lunatic, of unsound mind, and incapable of managing or conducting his affairs [*or, that A. B. was of unsound mind*] at the time of the execution of the will [*or, deed*] in question, to wit: on the                      day of                      , 18                      , and incompetent to execute the same; [*or, that A. B. was of unsound mind, and incompetent to contract matrimony, at the time of the solemnization of the marriage to E. D., to wit: on the                      day of                      , 18                      .*]

*In Action for Recovery of Real Property.*

We find the title of the land in question to be in the plaintiff; [*or, defendant; if there is a claim for the mesne profits add:*] and assess the damages for withholding the said premises, against the defendant, at                      dollars and six cents costs.

*Form of Polling the Jury.*

[*Begin with the first name on the panel, as in criminal actions.*] A. B., you say you find [*as the verdict may be: after the answer is given then call the next juror*], C. D., is that your verdict? [*Proceed in this manner through the list, and when all have answered, say:.*] Then, gentlemen of the jury, hearken to your verdict, as the court has recorded it. You say you find [*as the verdict may be*], and so you say all.

*Entry of Default.*

Clerk's Office of the District Court }  
of the 12th Judicial District,        } ss:

In this action, the defendants, John Smith and William Brown, having been regularly served with process, as appears by the papers on file herein, and having failed to appear and answer the complaint of the plaintiff on file herein; and the legal delay for answering having expired, the defaults of the said defendants,

John Smith and William Brown, in the premises, are hereby entered according to law.

Attest my hand and seal of said court this 21st day of June,  
A. D. 1859.

WILLIAM DUER, Clerk.

[L. S.]

By CHAS. S. CAPP, Deputy Clerk.

*Form of Docketing Judgment.*

Name of Judgment Debtor.	Name of Judgment Creditor.	Judgment.	Time of Entry.	Where Entered in Judgment Book.	Appeal when taken.	Judgment of Appellate Court.	Satisfaction of Judgment Entered.
C. D.	A. B.	Dams, \$525 00 Costs, 39 75	1858. May 5.	Folio 288.	1858. June 1.	1859. July 9. Judgment affirmed, with 5 per cent. damages; costs on appeal taxed, \$60.	Satisfied in full, Aug. 5, 1859.

*Entry in the Minutes of the Election of Associate Justices of the Court of Sessions.*

Court of Sessions, Oct. Term, 1858.

Tuesday, Oct. 12.

The court met pursuant to adjournment.

Present—Hon. M. C. Blake, county judge, S. A. Hastings, and S. P. Burnham.

The regular convention for the election of associate justices having met, pursuant to statute, on the fourth day of October, A. D. 1858, it is ordered that the minute of the proceedings of said convention, taken and made at the time thereof, by the clerk of said convention, be entered, pursuant to statute, in the records of this court.

Minute of the proceedings of the convention of October 4th, 1858, for the election of associate justices of the Court of Sessions of the city and county of San Francisco.

State of California, }  
City and County of San Francisco, } ss :

On this fourth day of October, A. D. 1858, being the first Monday of the month subsequent to the general election of the year 1858, in pursuance of the call of the county judge of said city and county, convening, the persons elected as justices of the peace of said city and county, at the general election held on the first day of September, A. D. 1858, for the purpose of electing associate justices of the Court of Sessions of said city and coun-

ty, a convention of said persons was held at the chambers of said county judge at the city-hall, in the city and county of San Francisco.

Present—B. Carman, justice of the third township; Lawrence Ryan, justice of the first; George Robbins, justice of the fourth; William H. Culver, justice of the second; S. P. Burnham, justice of the fifth; Thomas Dorland, justice of the sixth.

Hon. M. C. Blake, county judge of said city and county, presided over the said convention, and William Duer, county clerk of said city and county, acted as clerk.

It being shown that the above-named persons were duly elected as justices of the peace of the said city and county, at the general election for the year eighteen hundred and fifty-eight, held in said city and county, on the first day of September, 1858, and that said justices elect, had severally duly qualified and filed their respective bonds as such justices, as required by law, and were all of the justices so elected on motion of Justice Ryan, the said justices proceeded to elect two of their number as associate justices of the Court of Sessions of said city and county.

The president thereupon appointed William H. Culver and Lawrence Ryan, tellers. On the ballot for election of one of the associate justices, the number of votes polled was six, of which S. P. Burnham received six votes; and thereupon the said S. P. Burnham was declared elected.

On the ballot for the remaining associate justice, the number of votes polled was six.

B. Carman received four votes, and Thomas Dorland received two votes; and thereupon B. Carman was declared elected.

The president then directed certificates to be made and issued, to S. P. Burnham and B. Carman, as associate justices elect, of the Court of Sessions of the city and county of San Francisco.

And thereupon, there being no further business before the convention, the same was adjourned *sine die*.

WM. DUER, County Clerk.

*Appointment of Associate Justice to serve in Court of Sessions, during the temporary absence of Associate Justice Elect.*

In the Court of Sessions of the }  
County of . }

Thursday,

A. D. 18 .

At the time for the opening of the court, A. B., Esq., one of the associate justices of said Court of Sessions, being absent, and upon learning that he is unable to be present, I do hereby, before the transaction of any business in said court, designate and appoint C. D., Esq., one of the justices of the peace of said county, associate justice of said court, in the place of, and

to supply the vacancy or deficiency occasioned by the absence of said A. B. for the present term of said court. E. F.  
County Judge of the County of

*Form for Certifying and Transferring Indictment to the District Court.*

City and County of San Francisco, ss :

I, William Duer, county clerk of said city and county, and *ex officio* clerk of the court of sessions thereof, do hereby certify that, on motion of \_\_\_\_\_ Esq., district attorney of said county, made in open court in said court of sessions, on the \_\_\_\_\_ day of \_\_\_\_\_, 1859, it was ordered by said court that the indictment found against \_\_\_\_\_, the within-named defendant, and filed in said court on the \_\_\_\_\_ day of \_\_\_\_\_, 1859, charging him with the crime of \_\_\_\_\_, be certified and transferred to the District Court of the \_\_\_\_\_ judicial district of the state of California, in and for the \_\_\_\_\_ county of \_\_\_\_\_ for trial.

And in pursuance of the said order, I do hereby certify the within to be the original indictment so found and filed as aforesaid in said court of sessions, on the \_\_\_\_\_ day of \_\_\_\_\_, 1859, and do hereby transfer the same to said district court for trial.

Witness my hand, and the seal of said court of sessions, this \_\_\_\_\_ day of \_\_\_\_\_, 1859.

WILLIAM DUER, Clerk.

By D. P. BELKNAP, Deputy.

*Subpoena in a Criminal Case.*

The People of the State of California to A. B.

You are commanded to appear before the court of sessions of the city and county of San Francisco, state of California, at the court house of said court, in the city-hall of said city and county, on the eighth day of June, A. D. 1859, at ten o'clock A. M., as a witness in a criminal action prosecuted by the people of the state of California against M. N., on the part of the defendant. [If books, papers, or documents be required, insert a direction to the following effect in the subpoena.] And you are required also to bring with you the following [describe intelligibly the books, papers, or documents required].

By order of the court,

[L. s.]

WILLIAM DUER, Clerk.

By J. F. BOWMAN, Deputy Clerk.

*Return of Sheriff on Service of Subpœna in a Criminal Action.*

Sheriff's Office,  
 City and County of San Francisco, } ss :

I hereby certify that I served the within subpœna on the within-named witness A. B., at the city and county of San Francisco, on the sixth day of June, 1859, by showing the original to said witness, personally, and informing him of the contents thereof.

CHARLES DOANE,

Sheriff of the City and County of San Francisco.

By H. L. DAVIS, Deputy.

San Francisco, June 8th, 1859.

*Affidavit as to Non-Resident Witnesses.*

Court of Sessions of the City and County of San Francisco.

The People of the State of California, }  
*against*  
 Y. Z.

State of California, } ss :  
 City and County of San Francisco, }

Harvey S. Brown, being duly sworn, deposes and says that he is the district attorney in and for said city and county; that above entitled cause is at issue, and is set to be tried on the 30th day of March instant thereon; that A. B. is a necessary and material witness in the above cause, and resides and now is in Marysville, Yuba county, in this state; that C. D. is a necessary and material witness in above cause, and resides and is now in the county of Butte, in this state; that E. H. is a material and necessary witness in above cause, and resides at or near Honey Lake, in the county of Plumas or Sierra, in this state; that each and every of said witnesses is out of the city and county of San Francisco; that the evidence of each and every of said witnesses is material on the trial of said cause on the part of the people, and that the attendance of such and every of said witnesses at said trial, on the 30th day of March instant, is necessary; and further deponent says not.

H. S. BROWN.

Subscribed and sworn to before me, this 12th day of March, A. D. 1859.

W. BARTLETT, Deputy County Clerk.

*Order on the above Affidavit, to be Endorsed on the Subpœna.*

It satisfactorily appearing to me upon an affidavit of H. S. Brown, district attorney for the city and county of San Francisco, that the evidence of the within-named witness is material, and his attendance necessary at the trial, and that he resides out of said city and county where the trial is to take place, it is or-



dered that the within-named witness attend at the time and place mentioned in the within subpoena, in obedience to the commands thereof and of this order.

Dated San Francisco, March 12th, 1859.

M. C. BLAKE, County Judge,  
Of the City and County of San Francisco.

*Order against Defaulting Witness, Subpoenaed before the Grand Jury.*

Court of Sessions, }  
In and for the City and } April Term, 1859.  
County of San Francisco, }

Thursday, June 2d, 1859, as yet of said April Term.

The grand jury came into court, and by their foreman represented to the court that A. B. is a material witness in a proceeding before said grand jury, and that having been served with a subpoena to attend before them, he had nevertheless neglected so to attend, and the said grand jury thereupon by their foreman ask for an attachment against said A. B. And upon said application, and due proof being filed, of the facts stated therein, and of the service of a subpoena upon said A. B., and his failure to obey the same, it is ordered by the court that said A. B. appear before said court of sessions, at ten o'clock, A. M., on Friday, June 3d, and show cause why he should not be punished for contempt in disobeying said subpoena.

*Writ of Attachment.*

The People of the State of California, to the Sheriff of the City and County of San Francisco, greeting:

You are hereby commanded, forthwith, to attach the body of A. B., and bring him before the court of sessions of said county, to answer, &c. [as may be].

Witness, Hon. M. C. BLAKE, county judge of the county of San Francisco, this first day of June, 1859.

WILLIAM DUEB, Clerk.

By WM. R. SATTERLEE, Deputy Clerk.

*Bench Warrant on a Presentment.*

State of California, }  
County of , } ss :

The people of the state of California, to any sheriff, constable, marshal or policeman in this state. A presentment having been made, on the            day of            , 18    , to the court of sessions

of the county of \_\_\_\_\_, charging C. D. with the crime of \_\_\_\_\_ (designating it generally); you are therefore commanded forthwith to arrest the above named C. D., and take him before E. F., a magistrate of this county, or, in case of his absence or inability to act, before the nearest or most accessible magistrate in this county.

Given under my hand, with the seal of said court affixed, this day of \_\_\_\_\_, A. D., 18 \_\_\_\_ . By order of the court.

G. H., Clerk.

*Bench Warrant on an Indictment.*

State of California, } ss:  
County of \_\_\_\_\_, }

The people of the state of California to any sheriff, constable, marshal or policeman in this state. An indictment having been found on the \_\_\_\_\_ day of \_\_\_\_\_, A. D., 18 \_\_\_\_, in the court of sessions of the county of \_\_\_\_\_, charging C. D. with the crime of \_\_\_\_\_ (designating it generally). You are therefore commanded forthwith to arrest the above-named C. D., and bring him before that court to answer the indictment; or if the court have adjourned for the term, that you deliver him into the custody of the sheriff of the county of \_\_\_\_\_.

Given under my hand with the seal of the court affixed, this the \_\_\_\_\_ day of \_\_\_\_\_, A. D. 18 \_\_\_\_, seal. By order of the court.

E. F., Clerk.

*Recognizance of Bail before Indictment.*

State of California, } ss:  
County of \_\_\_\_\_, }

An order having been made on the \_\_\_\_\_ day of \_\_\_\_\_, A. D. 18 \_\_\_\_, by A. B., justice of the peace of \_\_\_\_\_ county [or as the case may be], that C. D. be held to answer upon a charge of [stating briefly the nature of the offence], upon which he has been duly admitted to bail, in the sum of \_\_\_\_\_ dollars, we, E. F. and G. H. [stating their place of residence], hereby undertake that the above-named C. D. shall appear and answer the charge above mentioned, in whatever court it may be prosecuted, and shall at all times render himself amenable to the orders and process of the court, and if convicted shall appear for judgment and render himself in execution thereof, or if he fail to perform either of these conditions, that we will pay to the people of the state of California the sum of \_\_\_\_\_ dollars, [inserting the sum in which the defendant is admitted to bail.]

*Recognizance of Bail after Indictment.*

State of California, }  
 City and County of San Francisco, } ss:

An indictment having been found on the first day of May, A. D. 1859, in the court of sessions of the city and county of San Francisco, charging A. B. with the crime of grand larceny, and he having been duly admitted to bail in the sum of one thousand dollars, we, C. D. and E. F., residents of San Francisco, hereby undertake that the above-named A. B. shall appear and answer the indictment above mentioned in whatever court it may be prosecuted, and shall at all times render himself amenable to the orders and processes of the court, and if convicted, shall appear for judgment, and render himself in execution thereof, or if he fail to perform either of these conditions, that we will pay to the people of the state of California the sum of one thousand dollars.

C. D.  
 E. F.

Acknowledged this 1st day of May, }  
 A. D. 1859, in presence of }  
 M. C. BLAKE, }  
 County Judge.

State of California, }  
 City and County of San Francisco, } ss:

We do solemnly swear that we and each of us are worth the sum of one thousand dollars, the amount specified in the above recognizance, exclusive of property exempt from execution, and that we are householders [or freeholders] and residents in said state.

C. D.  
 E. F.

Sworn to before, this 1st day of }  
 May, 1859, M. C. BLAKE, }  
 County Judge.

(Endorsed). Approved this 1st day of May, 1859.

M. C. BLAKE, County Judge.

*Recognizance on a Recommitment.*

An order having been made on the            day of           , A. D. 18   , by the court [naming it], that A. B. be admitted to bail in the sum of            dollars, in an action pending in that court against him in behalf of the people of the state of California, upon an [information, presentment, indictment, or appeal, as the case may be], we, C. D. and E. F., of [stating their places of residence], hereby undertake, that the above-named A. B. shall appear in that or any other court in which his appearance may be lawfully required upon that [information, presentment, indictment, or appeal, as the case may be], and shall at all times render

*Form of Plea.*

*Order for Change of Place of Trial in Court of Sessions.*

And the said defendant being in custody, it is further ordered, that the sheriff of this county remove the said defendant to the custody of the sheriff of the county of .

*Forfeit of Bail—Court of Sessions.*

Court of Sessions,	} June Term, 1858.
City and County of San Francisco.	
The People of the State of California	} Indictment for Grand
<i>against</i>	
A. B.	Larceny.

Upon motion of the district attorney, it was ordered, that the defendant, A. B., be called. And the said defendant having been thrice solemnly and duly called, failed and neglected to appear for trial. Whereupon, on motion of the district attorney, it was ordered that, C. D. and E. F., the bail of said A. B., be likewise called to produce the said A. B. in court for trial; and the said C. D. and E. F. having been thrice duly and solemnly called to produce the said A. B. for trial; and the said A. B. still neglecting and failing to appear, and the said bail wholly neglecting and refusing to produce said A. B. for trial, upon motion of the district attorney, the court directed the following order to be entered, to wit:

The above-named defendant, A. B., having been heretofore indicted for grand larceny, and duly admitted to bail in the sum of one thousand dollars, and the said A. B., on the 20th of July, A. D. 1858, having, without sufficient excuse, neglected to appear in court for trial, although the said A. B. was thrice solemnly called to appear in court for trial, and although C. D. and E. F., the bail of said A. B., were thrice solemnly called to produce said A. B. in court for trial, yet the said A. B. neglected and refused to appear for trial, and the said bail neglected and refused to produce the said A. B. for trial.

Now, therefore, it is ordered by the court that the recognizance executed by the said C. D. and E. F. be, and the same is hereby declared forfeited, and it is further ordered that the said A. B. be arrested, and committed to the custody of the sheriff of the city and county of San Francisco, until legally discharged therefrom. It is further ordered that the foregoing facts and order be entered on the minutes of this court.

*Forfeit of Money deposited as Bail.*

Court of Sessions,	} June Term, 1858.
City and County of San Francisco.	
The People of the State of California,	} Indictment
<i>against</i>	
A. B., indicted as C. D.	for
	Grand Larceny.

The above-named defendant, A. B., indicted by the name of C. D., having neglected to appear in court for the purpose of pleading, when his presence was lawfully required in court, al-

though he was called to appear in court for the purpose of pleading to the indictment therein, in a loud and audible voice at the court-room door, and proclamation publicly made that, unless he appear, the money, to wit: fifteen hundred dollars, deposited in lieu of bail for that amount, would be forfeited, and the said A. B., still neglecting to appear in court, now therefore, it is ordered that the foregoing facts be entered in the minutes of the court, and that the said sum of fifteen hundred dollars deposited in lieu of bail be, and the same is hereby, declared forfeited.

And it is further ordered that the said A. B. be rearrested by any sheriff, constable, marshal or policeman within this state, and be committed to the custody of the sheriff of the city and county of San Francisco, and that he be detained until legally discharged.

*Entry of Judgment on Conviction of Grand Larceny.*

Court of Sessions,	}	February Term, 1858.
City and County of San Francisco.		
The People of the State of California,	}	Stealing property of
<i>against</i>		
Alexander Orleanski.		C. H. Randall.
		Sentence.

Defendant appearing for judgment, is duly informed by the court of the nature of the indictment, the plea and the verdict, and being asked by the court if he had any legal cause to show why the judgment of the court should not be pronounced against him, and no sufficient cause being shown, the judgment of the court was pronounced as follows: that the defendant be imprisoned in the state prison for the term of five years.

*Entry of Additional Sentence.*

Court of Sessions,	}	February Term, 1858.
The People of the State		
of California	}	Stealing property of J. H. Gildimeester.
<i>against</i>		
Alexander Orleanski.		

Defendant appearing for judgment is duly informed by the court of the nature of the indictment, and his plea of guilty, and being asked if he had any legal cause to show why judgment should not be pronounced against him, and no sufficient cause being shown, the judgment of the court is pronounced as follows:

That the defendant be imprisoned in the state prison for the term of one year, such imprisonment to commence after the expiration of the foregoing sentence of five years.

*Trial of Issue of Insanity.*

Court of Sessions,  
 City and County of San Francisco. } October Term, 1858.  
 The People of the  
 State of California }  
*against*  
 Ching Lang Wo. }

This case having been formerly tried, and the defendant having been convicted of burglary, and afterward, upon application founded upon affidavits on behalf of defendant, an issue of the insanity of defendant having been ordered to be tried by a jury, the defendant's counsel and the district attorney being now present in court ready to try said issue, a jury is now ordered to be drawn.

And thereupon the following jurors having been called and examined as to their competency, and duly accepted by the parties, who agree to go to trial with said jury, the said jurors are duly empanelled and sworn, the issues herein joined well and truly to try—to wit:

A. M.  
 B. L.

E. C.  
 S. D., &c.

And thereupon the evidence is proceeded with, and Tong K. Achick, Ko Hong, J. W. Pickett, W. Tennents, Josiah Palmer, and J. H. Tibbetts, were duly called, sworn and examined on the part of the defendant as witnesses to establish the insanity of defendant; and Ira C. Root, was then called, sworn and examined as a witness on the part of the people. And the evidence being closed on both sides, the case was submitted to the jury under the charge of the court; and the jury, having retired for deliberation in charge of a sworn officer, returning into court after such deliberation, say by their foreman, "We find the defendant insane at the time of the committing of the burglary, and insane at the present time."

And said verdict having been duly recorded by the clerk, is read to the jury, who are asked by the clerk if the same is their verdict, to which all of said jurors duly assent.

And thereupon it is ordered by the court upon application of Tong K. Achick, the district attorney assenting thereto, that the said defendant Ching Lang Wo, so found to be insane aforesaid, be committed to the care and custody of the said Tong K. Achick, a proper and responsible person, until the further order of the court.





*Concluding-Part of the Entry of Judgment in a Civil Case,  
where the Jury find the Defendant to have committed  
Fraud.—County Court.*

We find for the plaintiff upon all the issues made in the case, to wit: That, on the 15th of May, A. D. 1858, the said plaintiffs were associated as partners in the business of manufacturing perfumery in the city and county of San Francisco, that while so engaged in business they employed the defendant as an agent to sell and dispose of perfumery for them and to receive payment therefor, for which said defendant was to receive the sum of ten per cent. upon the amount of all sales made by him; that while acting as agent for them, as aforesaid, the said defendant, to wit, on the 30th of May, 1858, or thereabouts, did sell and dispose of, on behalf of the plaintiff, to divers parties, perfumery to the amount of five hundred and fifty dollars, and of which amount he collected and received the sum of one hundred and forty dollars and seventy-five cents; that out of said last-named sum, the said defendant was entitled to the sum of fifty-five dollars as commissions; and that there is due to the plaintiff from the defendant, of the amount so collected, the sum of eighty-five dollars and seventy-five cents; that the plaintiffs did, on or about the 30th of June, A. D. 1858, and at divers times thereafter, duly demand from the said defendant payment of the said sum of money so due to them; that said defendant has refused to pay the same, and wilfully and corruptly converted the same to his own use; and the jury further assessed the damages in favor of the plaintiff for the money so received and converted by the defendant to his own use, at the sum of eighty-five dollars and seventy-five cents.

Wherefore, by reason of the law, and the verdict of the jury, as aforesaid, it is ordered, adjudged, and decreed, that the defendant is indebted to the plaintiffs in the sum of eighty-five dollars and seventy-five cents, for money collected, received, and converted to his own use while acting in the capacity of agent of plaintiffs; and that plaintiffs do have, and recover from said defendant, the sum of eighty-five dollars and seventy-five cents, with interest thereon, at the rate of ten per cent. per annum, from the date thereof until paid, together with said plaintiffs' costs and disbursements in this action, and the percentage allowed by law—in all amounting to the sum of fifty-eight dollars and three cents.

Judgment rendered, Sept. 16, A. D. 1858.

*Confession of Judgment.*

In the District Court of the 4th Judicial District, City and County  
of San Francisco, State of California,

William M. Black }  
*against*  
John P. Squibob. }

I, John P. Squibob, defendant above named, do hereby confess judgment in this cause in favor of the said plaintiff, William M. Black, for the sum of two hundred and twenty-four dollars and seventy-five cents; and I hereby authorize the clerk of said court to enter a judgment therein therefor against me for said sum, together with costs of entering the same, with legal interest thereon from date.

This confession of judgment is for a debt now justly due and owing to the said plaintiff, arising upon the following facts, to wit: money had and received at said city and county of the said plaintiff, for the use and benefit of the said defendant, at his special instance and request, at various times, between the first of August, 1858, and the sixth of December, 1858, amounting to said sum of two hundred and twenty-four dollars and seventy-five cents.

San Francisco, Dec. 9, 1858.

JOHN P. SQUIBOB.

State of California, }  
City and County of San Francisco, }

John P. Squibob, the defendant above named, being duly sworn, deposes and says, that the facts stated in the above confession are true, and further he saith not. JOHN P. SQUIBOB.

Sworn and subscribed to, before }  
me, this 9th day of December, 1858. }

CHAS. S. CAPP, Deputy County Clerk.

*Entry of Judgment on the foregoing Confession.*

In the District Court of the Fourth Judicial District of the State  
of California, in and for the City and County of San Francisco.

William M. Black }  
*against*  
John P. Squibob. }

Register No. 7563.

December 9th, A. D. 1858.

In this action the defendant, John P. Squibob, having filed his confession of judgment, wherein he consents that judgment be entered in favor of the plaintiff, William M. Black, for the sum of two hundred and twenty-four <sup>100</sup> (\$224<sup>75</sup>/<sub>100</sub>) dollars, on application of John Reynolds, attorney for plaintiff, ordered, that judgment be entered in accordance with said confession.

Wherefore, by reason of the law and the premises aforesaid, it is ordered, adjudged and decreed, that William M. Black, plain-

tiff, do have and recover of and from John P. Squibob, defendant, the sum of two hundred and twenty-four (\$224<sup>75</sup>/<sub>100</sub>) dollars, and seventy-five cents with interest thereon at the rate of ten per cent. per annum from the date hereof until paid, together with said plaintiff's costs and disbursements incurred in this proceeding, amounting to the sum of nine dollars and fifty cents (\$9<sup>50</sup>/<sub>100</sub>).

Judgment entered December 9th, A. D. 1858.

I hereby certify the foregoing to be a true copy of the judgment entered in the above-entitled action.

Attést my hand and seal of said Fourth District Court, this ninth day of December, A. D. 1858.

[L. s.]

WILLIAM DUER, Clerk.

By CHAS. S. CAPP, Deputy Clerk.

*Order to Transfer Cause to another Court, on account of  
Disability of the Judge.*

A. B. }  
against  
C. D. }

It being shown to the court by Townsend, of counsel for the defence, that the judge of this court was heretofore of counsel in a cause involving the same title which is in issue in this cause: Wherefore it is ordered that this cause be transferred to the District Court of the fourth judicial district for trial. The costs of this term to abide the event of the suit.

*Order Appointing an Elisor.*

Third District Court.

County of Santa Cruz,  
Goodwin Castle  
against

A. B., sheriff, county of Santa Cruz. }

It appearing to the satisfaction of this court that a suit has been commenced as above entitled, and that the sheriff and the coroner of said county are parties, and are incapacitated to execute the orders and processes therein, on motion of plaintiff's attorneys, it is ordered that M. N., a citizen of , be and he is hereby appointed an elisor to execute all orders and process in said cause, in the same manner as the sheriff would be required to do by law if he were not a party to said suit; and that said elisor shall give security in the sum of \$5,000.

*Entry of Order admitting to Citizenship.*

Twelfth District Court.

In the matter of the application of Leon }  
Level to become a citizen. }

In open court appeared Leon Level, with his witnesses, Alexandre Halphen and Lazarus Wachenheimer, an applicant to be admitted a citizen of the United States, in pursuance of the statute in reference thereto made and provided, and said applicant having produced such evidence, made such declarations and renunciations, and taken such oaths as by the said Act of Congress are required,

It is ordered that said applicant be and he is hereby admitted to become a citizen of the United States of America.

*Order Confirming Mortgage Sale.*

In the District Court of the Twelfth Judicial District, State of California.

A. B., and others, }  
against } City and County of San Francisco.  
C. D. }

Charles Doane, Esq., sheriff of the city and county of San Francisco, having filed his report of the sale of the mortgaged premises set forth and described in the final decree herein, by which it appears that said premises were duly sold, and produced the net sum of two thousand and two hundred and twenty-six dollars and twenty cents, which has been applied in part satisfaction of said mortgage debt, leaving the sum of seven thousand and seventy-six dollars, and six cents, unpaid and unsatisfied, and now due and payable by said defendant C. D. to said A. B. and others, now on motion of said plaintiffs by their attorneys, Hoge & Wilson, it is ordered that said report and all things and matters therein contained do stand ratified and confirmed.

San Francisco, September 4th, 1858.

*Order for Execution for Deficiency on Mortgage Sale.*

12th District Court }  
against }  
C. D. }

On reading and filing report of sale herein by which it appears that there is a deficiency due the plaintiff herein, after applying the proceeds of sale of the property described in decree herein, the sum of \$2,871.60, with interest thereon at the rate of four per cent. per month, from the 14th day of August, 1858, until paid. On motion of Mr. Sharp, attorney for plaintiff, or-

dered that said report of sale be and the same is hereby confirmed, and that said plaintiff, A. B., have judgment and execution against said defendant, C. D., for said sum of \$2,871.60, with interest thereon at the rate of four per cent. per month, from said 14th day of August, 1858, until paid.

*Writ of Venditioni Exponas.*

United States of America, }  
 State of California, County of San Mateo. }  
 The People of the State of California, to the Sheriff of San Mateo  
 County, greeting :

Whereas, heretofore we issued our writ of execution to you, directed in the words and figures following, to wit: [*here copy in full the execution, omitting the return under which the sheriff made the sale of January 1st, 1858,*] and you on the                      day of January, 1858, made your return to the said writ, by which return it appears that you had levied on the real estate described as follows [*here insert description thereof as in the levy*], which real estate so levied on by you under said writ, remained unsold for want of buyers.

Therefore we command you that you sell, or cause to be sold, the real estate by you taken as aforesaid, and every part thereof, for the best price that can be obtained for the same, or so much thereof as may be sufficient to satisfy the said judgment, and make return of your proceedings herein within thirty days after the receipt of this writ by you.

Witness, the Hon. Edward Norton, judge of the district court of the 12th judicial district, in and for San Mateo county, and the seal of said court, this                      day of                      A. D. 1859.

[L. s.]

WILLIAM DUER, Clerk.

*Order for Writ of Assistance.*

State of California, }  
 City and County of San Francisco, }  
 In the District Court of the Twelfth Judicial District.  
 George Scarpa }  
     *against* }  
 José de la Cruz Sanchez. }

On reading and filing the affidavit of James Wilson setting forth that he was the purchaser of the premises described in the complaint herein, that he has presented to the defendant Sanchez the sheriff's deed for said property, and demanded possession thereof, and that said Sanchez has refused to deliver to him possession of said premises, and it appearing that due notice has

been given of this notice to Messrs. Stow & Brown, the attorneys of said defendant, now, on motion of Whitcomb, Pringle & Felton, on behalf of said Wilson, it is ordered that a writ of assistance issue to the sheriff of San Mateo county, to put the said James Wilson in possession of the said premises, and him in the possession thereof from time to time to maintain and defend.

*Writ of Assistance.*

In the District Court of the Fourth Judicial District of the State of California, in and for the City and County of San Francisco.

William Pitt }  
*against*  
 Guy Fawkes. }

The People of the State of California to the Sheriff of the City and County of San Francisco, send greeting:

Whereas, by a certain decree or judgment of our district court of the fourth judicial district, in a certain cause there pending, between William Pitt, plaintiff, and Guy Fawkes, defendant, made at a district court of the fourth judicial district, held at the city-hall, in the city and county of San Francisco, on the first day of May, in the year one thousand eight hundred and fifty-eight, in and for the city and county of San Francisco, before the Honorable John S. Hagar, judge of the fourth judicial district, it was, among other things therein contained, ordered, adjudged and decreed, by the said court, that the purchaser at the sale therein described should, on the production of the sheriff's deed for said premises, be forthwith put in possession of a certain piece or parcel of land situate in the said city and county, and therein described as follows, to wit: [*here insert description.*]

And whereas, the time for redemption having expired, and the said sheriff's deed duly executed and delivered to Charles Lamb, who was the purchaser at said sale, yet the said Charles Lamb has not been let into nor taken possession of the said piece of land, or any part thereof, according to the tenor of the said decree; and whereas, the said piece of land is in the tenure and occupation of said Guy Fawkes, and whereas, by an order of said district court of the fourth judicial district, made in the said cause on the fifth day of July, 1859, it was ordered that our writ of assistance should issue to you, the said sheriff, to put the said Charles Lamb in possession of the said piece or parcel of land, and him in possession thereof from time to time to maintain and defend.

Therefore, we command you, that immediately after receiving this writ, you go to and enter upon the said piece or parcel of land, and that you eject and remove therefrom all and every person or persons holding or detaining the same, or any part thereof, against the said Chas. Lamb; and that you put and place the said Charles Lamb or his assigns in the full, peaceable and quiet possession of the said piece or parcel of land without delay; and him, the said Chas. Lamb, in such possession thereof from time to time to maintain, keep and defend, or cause to be kept, maintained and defended, according to the tenor and true intent of the said decree and order of the said court.

Witness, Hon. John S. Hagar, judge of the fourth judicial district, at the city-hall in the city and county of San Francisco, and the seal of said court, this sixth day of July, A. D. 1859.

[L. S.]

WILLIAM DUER, Clerk.

By S. L. LUPTON, Deputy Clerk.

*Writ of Execution.*

State of California, }  
City and County of San Francisco, }

In the District Court of the Fourth Judicial District.

The People of the State of California to the Sheriff of the City and County of San Francisco, greeting:

Whereas, on the fifth day of February, A. D. 1859, Charles Box, plaintiff, recovered a judgment in the district court of the fourth judicial district, against Peter Chest, for the sum of five hundred dollars damages, with interest thereon at the rate of ten per cent. per annum till paid, together with his costs and disbursements at the date of said judgment, and accruing costs, amounting to the sum of two hundred and five <sup>00</sup>/<sub>100</sub> dollars, as appears to us of record.

And whereas, the judgment roll in the action in which said judgment was entered, is filed in the clerk's office of said court, in the city-hall, in said city and county of San Francisco, and the said judgment was docketed in said clerk's office, in said city and county, on the sixth day of February, 1859, and the sum of seven hundred and five <sup>00</sup>/<sub>100</sub> dollars, with interest as aforesaid, is now (at the date of this writ) actually due on said judgment,

Now, you, the said sheriff, are hereby required to make the said sum of five hundred dollars damages, with interest as aforesaid, and said sum of two hundred and five <sup>00</sup>/<sub>100</sub> dollars of costs, to satisfy the said judgment, out of the personal property of the said debtor, Peter Chest, in your county, and if sufficient personal property of said debtor cannot be found, then out of the real property in your county belonging to said Peter Chest, on the sixth day of February, 1859, (the day whereon

said judgment was docketed your county,) or at any time thereafter; and to have those moneys before our said court, at the clerk's office of said court, at the city-hall in the city and county aforesaid, on the twenty-sixth day of February, A. D. 1859, to render unto the said Charles Box, plaintiff, in satisfaction for the damages, interest and costs aforesaid: and have you then there this writ with a return under your hand of what you have done thereunder.

Witness, Hon. John S. Hagar, judge of our district court of the fourth judicial district, at the city-hall in the said city and county, this sixth day of February, A. D. 1859.

Attest my hand and the seal of the said court, the  
[L. s.] day and year last above written.

WILLIAM DUER, Clerk.

*Another Form.*

District Court of the Fourth Judicial District of the State of California, City and County of San Francisco.

The People of the State of California to the Sheriff of the

County of greeting :  
Whereas, on the day of , A. D. 18 , plaintiff, recovered a judgment in the said district court of the fourth judicial district of the state of California, in and for the city and county of San Francisco, against for the sum of dollars, damages, with interest at the rate of per cent. per till paid, together with costs and disbursements at the date of said judgment, and accruing costs, amounting to the sum of as appears to us of record.

And whereas, the judgment roll in the action in which said judgment was entered, is filed in the clerk's office of said court, in the city and county of San Francisco, and the said judgment was docketed in said clerk's office, in the said city and county, on the day and year first above written.

And the sum of \$ , with interest is now (at the date of this writ) actually due on said judgment.

Now, you, the said sheriff, are hereby required to make the said sums due on the said judgment, for damages, with interest as aforesaid, and costs and accruing costs, to satisfy the said judgment, out of the personal property of the said debtor

or, if sufficient personal property of said debtor cannot be found, then out of the real property in your county



belonging to \_\_\_\_\_ on the day whereon said judgment was docketed, in the aforesaid city and county, or at any time thereafter; and make return of this writ within \_\_\_\_\_ days, with what you have endorsed hereon.

Witness, Hon. \_\_\_\_\_, judge of the fourth judicial district of the state of California, at the court-house, in the city and county of San Francisco, this \_\_\_\_\_ day of \_\_\_\_\_ A. D. 18 \_\_\_\_\_.

Attest my hand and the seal of said court, the day and year last above written. \_\_\_\_\_ Clerk.

By \_\_\_\_\_ Deputy Clerk.

*Order for Removal of Cause to United States Court.\**

In the District Court of the Sixth Judicial District of the State of California, in and for the County of Sacramento.

Joseph Brown }  
against  
John Smith. }

Upon reading and filing the petition of John Smith, the defendant in the above-entitled action, and upon finding the bond and sureties offered by him, the said defendant in the premises, good and sufficient, and the same being by me, the judge of said district court, duly accepted, it is hereby ordered that no further proceedings be had in this cause, and the removal of the same to the Circuit Court of the United States for the districts of California, to be held in and for the northern district of California, be, and the same is hereby allowed and ordered, in accordance with the aforesaid petition, and the statute of the United States in such case made and provided.

Dated, Sacramento, June 23, 1859.

*Certificate to Transcript on Appeal to the Supreme Court.*

State of California, }  
City and County of San Francisco, } ss:  
Henry A. Bull }  
against  
John O. Cox. }

Clerk's Office of the District Court of the 4th Judicial District.

I, William Duer, clerk of the district court of the fourth judicial district, do hereby certify, that the foregoing complaint, amended answer, judgment, settled statement and notice of ap-

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\* The matter of removal of actions from a State Court to the U. S. Court is freely considered in Conkling's Treatise, 2d ed. p. 473.

peal are true and correct copies of the original papers on file in my office, and of the order of trial entered in the minutes of said court, and that the same constitute the transcript or appeal from the judgment made and entered on the 27th day of August, A. D. 1859, in favor of said plaintiff and against said defendant.

I do further certify, that the undertaking on appeal has been duly filed according to law.

In witness whereof, I have hereunto set my hand and seal of said district court of fourth judicial district, this first day of May 1859.

WILLIAM DUER, Clerk.

[L. s.]

By JAMES B. McMINN, Deputy Clerk.

*Certificate of Official Character.*

State of California, } ss:  
City and County of San Francisco, }

I, William Duer, clerk of the county court of the city and county of San Francisco, state of California, do hereby certify, that , whose genuine signature is affixed to the foregoing certificate, was, at the time of signing the same, and still is, of the city and county of San Francisco, duly authorized by law to take such acknowledgment, or to administer such oath and certify the same (or to make such certificate), and that full faith and credit are due to all his official acts.

Witness my hand and the seal of said county court, this day of , A. D. 18 .

[L. s.]

WILLIAM DUER, Clerk.

By J. F. BOWMAN, Deputy Clerk.

*Certificate of Exemplification of Record.*

State of California, } ss:  
City and County of San Francisco, }

I, William Duer, county clerk of the city of San Francisco, state of California, and *ex officio* clerk of the Probate Court thereof, do hereby certify, that the foregoing eight pages, numbered from one to eight inclusive, contain a true, full, and correct transcript of all the papers, orders, and proceedings on file, and of record in any office, in the matter of the estate of A. B. deceased.

Witness my hand and the seal of said Probate Court, this fourteenth day of April, one thousand eight hundred and fifty-nine.

WILLIAM DUER, Clerk.

[L. s.]

*Certificate of Judge to Signature, &c., of the Clerk.*

State of California,  
 City and County of San Francisco, } ss:

I, M. E. Blake, judge of the Probate Court of the city and county of San Francisco, do hereby certify, that William Duer, whose genuine signature is affixed to the foregoing certificate, is, and was at the time of signing the same, the clerk of said court, duly authorized by law to make such certificate, that he is the legal keeper of said record, and that the foregoing attestation is in due form.

Witness my hand, this fifteenth day of April, one thousand eight hundred and fifty-nine.

M. C. BLAKE, Probate Judge.

*Certificate of Exemplification of Record.*

The People of the State of California, by the grace of God free and independent, to all to whom these presents shall come, greeting:

Know ye, that we, having inspected the records and files in the office of the clerk of the city and county of San Francisco, and clerk of the district court of the twelfth judicial district of the state of California, in and for said city and county, do find a certain judgment roll there remaining of record, which is in the words and figures following, to wit: [*here insert the record and conclude as follows,*] all of which we have caused to be exemplified in accordance with the act of Congress.

Attest my hand and the seal of said 12th district court, this first day of July, A. D. one thousand eight hundred and fifty-nine.

WILLIAM DUER, Clerk.

[L. S.]

By WM. R. SATTERLEE, Deputy.

*Certificate to Copy of a Record, or Paper, on File in the Clerk's Office.*

State of California,  
 City and County of San Francisco, } ss:  
 County Clerk's Office, May 1, 1859.

I, William Duer, county clerk of the city and county of San Francisco [*where the paper is on file or on record in one of the courts of which he is clerk, add,* and clerk of the court], do hereby certify, that I have compared the foregoing copy of a [*name the instrument*], and of the endorsements thereupon, with the original records of the same remaining in this office [*or,* with the originals now remaining on file in this office], and that

the same are correct transcripts therefrom, and of the whole of said original records [or, originals].

[L. s.] Witness my hand and the seal of, &c., [as in foregoing forms.]

*Certificate of a Judge to the Signature and Attestation of an Officer.*

State of California, }  
County of Santa Clara, }

I, William H. McKee, judge of the third judicial district of the state of California, in and for the county of Santa Clara, do hereby certify that Austin M. Thompson, by whom the annexed transcript [or record, or copy of, as the case may be], certificate and attestation were made and given, and who in his own proper handwriting has thereunto subscribed his name [where he is an officer having a seal, add, and affixed his official seal], was at the time of so doing, and now is, county recorder, in and for the said county of Santa Clara, state of California, duly commissioned and qualified; to all whose acts as such, full faith and credit are and ought to be given, as well in courts of jurisdiction as elsewhere, and that the said transcript [or record, or copy of, as the case may be], certificate and attestation, are in due form and made by the proper officer.

In witness whereof, I have hereunto set my hand, the tenth day of May, one thousand eight hundred and fifty-nine.

WILLIAM H. MCKEE, District Judge.

*Certificate of Clerk of Court to the Signature of the Judge.*

County of Santa Clara, ss:

I, John B. Hewson, county clerk of the county of Santa Clara, state of California, and *ex officio* clerk of the district court of the third judicial district, in and for the county of Santa Clara, do hereby certify that the Hon. William McKee, by whom the foregoing attestation was made, and whose genuine signature is subscribed thereto, was at the time of signing the same, and still is, judge of the district court of the third judicial district, in and for the county of Santa Clara, duly commissioned and sworn, to whose acts as such full faith and credit are due.

In witness whereof, I have hereunto set my hand and the seal of said third district court, this tenth day of May, A. D. 1859.

[L. s.]

JOHN B. HEWSON, Clerk.

## CHAPTER XIII.

## CONTRACTS AND AGREEMENTS.

## I. OF CONTRACTS OR AGREEMENTS GENERALLY.

A CONTRACT is an agreement between two or more persons, upon a sufficient consideration, to do or not to do a particular thing.

To constitute a valid contract, or agreement, there must be—

1. The mutual assent of two or more persons competent to contract; an intelligent meeting of the minds of the parties.

2. A good and valid consideration, *i. e.*, motive or inducing cause to make the promise upon which the party is to be held or charged.

3. A subject matter of the contract, *i. e.*, a thing to be done, or omitted. And the thing agreed to be done must be one not forbidden by law; or, if the agreement be to omit or forbear from doing a certain thing, it must be a thing not enjoined or made a duty by law.

Contracts are divided into agreements by specialty, made by a written instrument under seal, and agreements without specialty, made either by a written instrument without a seal, or verbally without any writing. In practical effect, the only difference between a written contract without a seal and a mere verbal agreement is, that the former is more easily proved. In certain cases agreements by specialty are of higher consideration in the law than agreements without specialty; and it is therefore advisable for laymen, who are not supposed to know in what cases a seal may be dispensed with, and for what purposes it may be desirable, to add a seal whenever they draw their own contracts or act without legal advice.

In this state, a seal made of a foreign substance, and affixed to the document, is not necessary, and a stamp or impression

upon the paper is a good seal. A mere scrawl with a pen made upon the paper in the form of a seal, with the initials of the party written within the outline of the seal, has been held to be sufficient by the Supreme Court.

The essence of an agreement is the intelligent assent or union of the minds of the parties, and in its construction the actual intent of the parties is to be regarded. But, if the terms of the contract are clear, it will be binding even though contrary to the intention of the parties. For parol proof cannot be resorted to to modify the language of a written contract where it admits of a sensible construction. Only where there is a doubt or ambiguity in the terms of the written instrument, can parol proof or extrinsic circumstances be invoked to aid in its construction.

If, however, a written instrument fails to express the real contract designed to be made by the parties, in consequence of a mistake in the words or language used, courts having equity jurisdiction will generally reform the contract by making it conformable to the intention of the parties.

Incapacity to contract arises, among other causes, from infancy, from marriage (on the part of the woman), and from insanity.

Infants are incapable of binding themselves by contract, except for necessities. The contract entered into by an infant may be repudiated at his option, either before his majority or within a reasonable time after it. He may also ratify and confirm it. This, however, must be done by a new promise, made after he has attained his majority. If the promise be a conditional one, the party seeking to enforce it must show the fulfilment of the condition. The contract of an infant may also be confirmed without an express new promise; and where he has neither disavowed nor affirmed it by words, a ratification is sometimes inferred from his acts. The question as to precisely what acts or omissions amount to a confirmation, is one which would require too much space, and is in its nature too nice to be capable of proper discussion in a work of this kind.

The exception to the rule permitting an infant to repudiate contracts made by him, is the case where the promise or agreement is for necessities.

In regard to the age of majority in this state, see the statutory

provision below cited, under head of MISCELLANEOUS PROVISIONS.

In regard to the power of married women to contract, see title, HUSBAND AND WIFE.

Fraud vitiates and annuls all contracts which are tainted by it, and the party guilty of the fraud cannot enforce the contract; nor can he, on the other hand, himself avoid it for his own benefit, if it is sought to be enforced by the other party. Even one who executes a fraudulent bill of sale to a third person, with intent to defraud his creditors, cannot set the bill aside, though the creditors may do so.

## II. STATUTORY PROVISIONS.

1. Every contract for the leasing for a longer period than one year, or for the sale of any lands or any interest in lands, shall be void, unless the contract, or some note or memorandum thereof expressing the consideration, be in writing, and be subscribed by the party by whom the lease or sale is to be made.

2. Every instrument required to be subscribed by any person, under the last section, may be subscribed by the agent of such party, lawfully authorized.<sup>1</sup>

3. In the following cases every agreement shall be void, unless such agreement, or some note or memorandum thereof expressing the consideration be in writing, and subscribed by the party charged therewith: 1. Every agreement that by the terms is not to be performed within one year from the making thereof. 2. Every special promise to answer for the debt, default or miscarriage of another. 3. Every agreement, promise or undertaking made upon consideration of marriage, except mutual promises to marry.

4. Every contract for the sale of any goods, chattels or things in action, for the price of two hundred dollars or over, shall be void, unless: 1. A note or memorandum of such contract be made in writing, and be subscribed by the parties to be charged

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<sup>1</sup> Wood's Dig. arts. 396, 397. In article 398 it is declared, that the provisions contained in the chapter of which those above cited form a part, "shall not be construed to abridge the powers of courts to compel the specific performance of agreements in cases of part performance of such agreements.

therewith; or, 2. Unless the buyer shall accept or receive part of such goods, or the evidences, or some of them, of such things in action; or, 3. Unless the buyer shall at the time pay some part of the purchase money.

5. Whenever goods shall be sold at auction, and the auctioneer shall, at the time of sale, enter in a sale-book a memorandum, specifying the nature and price of the property sold, the terms of the sale, the name of the purchaser, and the name of the person on whose account the sale is made, such memorandum shall be deemed a note of the contract of sale within the meaning of the last section.

6. Every sale made by a vendor of goods and chattels in his possession, or under his control, and every assignment of goods and chattels, unless the same be accompanied by an immediate delivery, and be followed by an actual and continued change of possession of things sold or assigned, shall be conclusive evidence of fraud as against the creditors of the vendor, or the creditors of the person making such assignment, or subsequent purchasers in good faith.

7. Every instrument required by any of the foregoing provisions to be subscribed by any party, may be subscribed by the lawful agent of such party.

8. The term "lands," as used in the foregoing statutory provisions, is to be construed as coextensive in meaning with lands, tenements and hereditaments, and the terms "estate and interest in lands," are to be construed to embrace every estate and interest, present and future, vested and contingent, in lands, as above defined.

**OF CERTAIN CONTRACTS, IN WHICH OFFICERS ARE PROHIBITED FROM BEING INTERESTED.<sup>1</sup>**

1. It shall not be lawful for any officer of state or member of legislature, alderman, or member of the common council of any city in this state, or for the trustees of any city, town or village, or for the supervisor of any county, to become a contractor under any contract or order for supplies authorized by or for the state, or any department thereof, or the legislature, or either branch

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<sup>1</sup> Wood's Dig. p. 569, art. 2904-A.



thereof, or by or for the aldermen or common council, board of trustees, or board of county supervisors of which he is a member, or to be in any manner interested directly or indirectly as principal in any such contract.

2. It shall not be lawful for any town, city, county or state officer, or member of the legislature, to be interested in any contract made by such officer or legislature of which he is a member; or be a purchaser, or be interested in any purchase at any sale made by such officer, or a seller at any purchase made by such officer in the discharge of his official duties.

3. All contracts made in violation of the provisions of the first and second sections of this act may be declared void at the instance of the city, town or village, or county interested, or of any other party interested in such contract, except the officers prohibited in said sections from making or being interested in such contract.

4. Any person violating the provisions of this act, directly or indirectly, shall forfeit his office, and shall be punished by fine not less than five hundred nor more than five thousand dollars, or by imprisonment in the county jail for not more than six months, or both.

**PUNISHMENT OF CERTAIN FRAUDULENT CONTRACTS.<sup>1</sup>**

1. If any debtor shall fraudulently remove his property or effects out of this state, or shall fraudulently sell, convey, or assign or conceal his property or effects, with intent to defraud, hinder or delay his creditors of their just rights, claims or demands, he shall, on conviction, be punished by imprisonment in the county jail for any term not exceeding one year, or by fine not exceeding five thousand dollars, or by both fine and imprisonment.

2. Any person against whom an action is pending, or against whom a judgment has been rendered for the recovery of any personal property or effects, who shall fraudulently conceal, sell, or dispose of such property or effects, with intent to hinder, delay or defraud the person bringing such action, or recovering such judgment, or shall with such intent remove such property

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<sup>1</sup> Wood's Dig. p. 856, art. 1995-6.

or effects beyond the limits of the county in which it may be at the time of the commencement of such actions, or the rendering of such judgment, shall, on conviction, be punished as provided in the above section.

**OF THE TIME WITHIN WHICH ACTIONS UPON CONTRACTS MAY BE BROUGHT.**

The statute of this state in reference to the limitation of the time for bringing civil actions, provides as follows:¹

1. The people of this state will not sue any person for or in respect to any real property, or the issues or profits thereof, by reason of the right or title of the people to the same, unless: 1. Such right or title shall have accrued within ten years before any action or other proceeding for the same shall be commenced, or unless, 2. The people, or those from whom they claim, shall have received the rents and profits of such real property, or serve part thereof, within the space of ten years.

2. No action shall be brought for or in respect to real property by any person claiming by virtue of letters patent, or grants from this state, unless the same might have been commenced by the people, as above specified, in case such patent or grant had not been issued or made.

3. When letters patent or grants of real property shall have been issued or made by the people of this state, and the same shall be declared void by the determination of a competent court, rendered upon an allegation of a fraudulent suggestion, or concealment, or forfeiture, or mistake, or ignorance of a material fact, or wrongful detaining, or defective title, in such case an action for the recovery of the premises so conveyed may be brought, either by the people of this state, or by any subsequent patentee or grantee, of the same premises, his heirs, or assigns, within five years after such determination was made, but not after that period.

6. No action for the recovery of real property, or for the recovery of the possession thereof, shall be maintained, unless it appear that the plaintiff, his ancestor, predecessor or grantor,

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¹ Wood's Dig. p. 45.

was seized or possessed of the premises in question, within five years before the commencement of such action; *provided, however*, that an action may be maintained by a party claiming such real estate, or the possession thereof, under title derived from the Spanish or Mexican governments, or the authorities thereof, if such action be commenced within five years from the time of the final confirmation of such title by the government of the United States, or its legally constituted authorities.

7. No cause of action, or defence to an action, founded upon the title to real property, or to rents, or to services out of the same, shall be effectual, unless it appear that the person prosecuting the action, or making the defence, or under whose title the action is prosecuted, or the defence is made, or the ancestor, predecessor, or grantor of such person, was seized or possessed of the premises in question, within five years before the commencement of the act, in respect to which such action is prosecuted, or defence made, or unless it appear that the title to such premises was derived from the Spanish or Mexican governments, or that the same was confirmed by the government of the United States, or its authorities, within five years before the commencement of such action.

8. Any peaceable entry upon real estate shall be deemed sufficient and valid as a claim, unless an action be commenced by the plaintiff in ejectment, within one year after the making such entry; or within five years from the time when the right to bring such action accrued, or within five years after the final confirmation by the United States of any title derived from Spain or Mexico.

9. In every action for the recovery of real property, or the possession thereof, the person establishing a legal title to the premises, shall be presumed to have been possessed thereof, within the time prescribed by law, and the occupation of such premises by any other person shall be deemed to have been under, and in subordination to, the legal title, unless it appear that such premises have been held and possessed adversely to such legal title, for five years before the commencement of such action.

10. Whenever it shall appear that the occupant, or those under whom he claims, entered into the possession of premises, under claim of title, exclusive of any other right, founding such

claim upon a written instrument, as being a conveyance of the premises in question, or upon the decree or judgment of a competent court, and that there has been a continued occupation and possession of the premises included in such instrument, decree, or judgment, or of some part of such premises, under such claim, for five years, the premises so included shall be deemed to have been held adversely, except that where the premises so included consist of a tract divided into lots, the possession of one lot shall not be deemed a possession of any other lot of the same tract.

11. For the purpose of constituting an adverse possession by any person claiming a title founded upon a written instrument, or a judgment or decree, land shall be deemed to have been possessed and occupied in the following cases: 1. Where it has been usually cultivated or improved. 2. Where it has been protected by a substantial enclosure. 3. Where (although not enclosed) it has been used for the supply of fuel, or of fencing timber, for the purposes of husbandry; or for the use of pasturage, or for the ordinary use of the occupant. 4. Where a known lot or single farm has been partly improved, the portion of such farm or lot that may have been left not cleared, or not enclosed, according to the usual course and custom of the adjoining country, shall be deemed to have been occupied for the same length of time as the part improved and cultivated.

12. Where it shall appear that there has been an actual continued occupation of premises, under a claim of title, exclusive of any other right, but not founded upon a written instrument, or a judgment, or decree, the premises so actually occupied, and no other, shall be deemed to have been held adversely.

13. For the purpose of constituting an adverse possession, by a person claiming title not founded upon a written instrument, judgment or decree, land shall be deemed to have been possessed and occupied in the following cases only: 1. Where it has been protected by a substantial enclosure. 2. Where it has been usually cultivated or improved.

14. Whenever the relation of landlord and tenant shall have existed between any persons, the possession of the tenant shall be deemed the possession of the landlord until the expiration of five years from the termination of the tenancy, or where there has been no written lease, until the expiration of five years from

the time of the last payment of rent, notwithstanding that such tenant may have acquired another title, or may have claimed to hold adversely to his landlord. But such presumptions shall not be made after the periods herein limited.

15. The right of a person to the possession of any real property shall not be impaired or affected by a descent being cast in consequence of the death of a person in possession of such property.

16. If a person entitled to commence any action for the recovery of real property, or to make an entry or defence, founded on the title to real property, or to rents or services out of the same, be, at the time such title shall first descend or accrue, either: 1. Within the age of twenty-one years; or, 2. Insane; or, 3. Imprisoned on a criminal charge, or in execution upon conviction of a criminal offence, for a term less than for life; or, 4. A married woman. The time during which such disability shall continue shall not be deemed any portion of the time in this act limited for the commencement of such action, or the making of such entry or defence, but such action may be commenced, or entry or defence made, within the period of five years after such disability shall cease, or after the death of the person entitled, who shall die under such disability; but such action shall not be commenced, or entry or defence made, after that period.

17. Actions, other than those for the recovery of real property, can only be commenced as follows: Within five years—An action upon a judgment or decree of any court of the United States, or of any state or territory within the United States. Within four years—An action upon any contract, obligation, or liability founded upon an instrument of writing, except those mentioned in the preceding section. Within three years—1. An action upon a liability created by statute, other than a penalty or forfeiture. 2. An action for trespass upon real property. 3. An action for taking, detaining, or injuring any goods or chattels, including actions for the specific recovery of personal property. 4. An action for relief on the ground of fraud, the cause of action in such case not to be deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud. Within two years—1. An action upon a contract, obligation, or liability, not founded upon an instrument of writing, including an action on an open account, for goods, wares and merchandise,

and an action for any article charged in a store account. 2. An action against a sheriff, coroner or constable, upon the liability incurred by the doing of an act in his official capacity and in virtue of his office, or by the omission of an official duty, including the non-payment of money collected upon an execution. But this section shall not apply to an action for an escape. Within one year—An action upon a statute for a penalty or forfeiture, where the action is given to an individual, or to an individual and the state, except where the statute imposing it prescribes a different limitation. An action upon a statute for a forfeiture or penalty to the people of this state. An action against a sheriff, or other officer, for the escape of a prisoner, arrested or imprisoned on civil process.

18. In an action brought to recover a balance due upon a mutual, open and current account, where there have been reciprocal demands between the parties, the cause of action shall be deemed to have accrued from the time of the last item proved in the account on either side.

19. An action for relief, not hereinbefore provided for, must be commenced within four years after the cause of action shall have accrued.

20. The limitations prescribed shall apply to actions brought in the name of the state, or for the benefit of the state, in the same manner as to actions by private parties.

21. An action shall be deemed to be commenced within the meaning of this act when the complaint has been filed in the proper court.

22. If, when the cause of action shall accrue against a person, he is out of the state, the action may be commenced within the term herein limited, after his return to the state; and if, after the cause of action shall have accrued, he depart the state, the time of his absence shall not be part of the time limited for the commencement of the action.

23. If a person, entitled to bring an action other than for the recovery of real property, except for a penalty or forfeiture, or against a sheriff or other officer for an escape, be at the time the cause of action accrued, either: 1. Within the age of twenty-one years; or, 2. Insane; or, 3. Imprisoned on a criminal charge, or in execution under the sentence of a criminal court, for a term

less than his natural life; or, 4. A married woman: the time of such disability shall not be a part of the time limited for the commencement of the action.

24. If a person entitled to bring an action die before the expiration of the time limited for the commencement thereof, and the cause of action survive, an action may be commenced by his representatives, after the expiration of that time, and within six months from his death. If a person against whom an action may be brought die before the expiration of the time limited for the commencement thereof, and the cause of action survives, an action may be commenced against his executors or administrators after the expiration of that time, and within one year after the issuing of letters testamentary, or of administration.

25. When a person shall be an alien subject, or citizen of a country at war with the United States, the time of the continuance of the war shall not be a part of the period limited for the commencement of the action.

26. If an action shall be commenced within the time prescribed therefor, and a judgment therein for the plaintiff be reversed on appeal, the plaintiff, or if he die and the cause of action survive, his heirs or representatives may commence a new action within one year after the reversal.

27. When the commencement of an action shall be stayed by injunction or statutory prohibition, the time of the continuance of the injunction or prohibition shall not be part of the time limited for the commencement of the action.

28. No person shall avail himself of a disability, unless it existed when his right of action accrued.

29. When two or more disabilities coexist at the time the right of action accrues, the limitation shall not attach until they all be removed.

30. The preceding sections of this act shall not affect actions against directors or stockholders of a corporation to recover a penalty or forfeiture imposed, or to enforce a liability created by law; but such actions must be brought within three years after the discovery by the aggrieved party of the facts upon which the penalty or forfeiture attached, or the liability was created.

31. No acknowledgment or promise shall be sufficient evidence of a new or continuing contract, whereby to take the case out of

the operation of this statute, unless the same be contained in some writing signed by the party to be charged thereby.

32. An action upon any contract, obligation or liability for the payment of money, founded upon an instrument of writing executed out of this state, can only be commenced as follows: 1. Within one year, when more than two and less than five years have elapsed since the cause of action accrued. 2. Within six months, when more than five years have elapsed since the cause of action accrued.<sup>1</sup>

33. When the cause of action has arisen in another state or a territory of the United States, or in a foreign country, and by the laws thereof an action thereon cannot there be maintained against a person by reason of the lapse of time, no action thereon shall be maintained against him in this state.

34. An action upon any judgment, contract, obligation or liability for the payment of money or damages obtained, executed or made out of this state, can only be commenced within two years from the time the cause of action has accrued or shall accrue.<sup>2</sup>

35. An action against any officer or *de facto* officer engaged in the collection of taxes, can only be commenced within six months: 1. For money paid to any such officer, under protest, or seized by such officer in his official capacity as a collector of taxes, and which it is claimed ought to be refunded. 2. To recover any goods, wares, merchandise, or other property seized by any such officer in his official capacity as tax collector, or to recover the price or value of any goods, wares, merchandise, or other personal property so seized, or for damages for the seizure, detention, sale of, or injury to, any goods, wares, merchandise, or other personal property, seized as aforesaid, or for damages done to any person or property in making any such seizure, or for damages for any act, or the consequences of any act, done by any such officer in his official capacity, as aforesaid.

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<sup>1</sup> Act of May 4, 1892, defining the time of commencing civil actions in certain cases.

<sup>2</sup> Supplementary act of April 2, 1895.



MISCELLANEOUS PROVISIONS.

THE LEGAL LABORING DAY.

Ten hours shall be considered a legal day's labor, in any action in law in any of the courts of this state.<sup>1</sup>

THE AGE OF MAJORITY.

Males shall be deemed of full and legal age when they shall be twenty-one years old, and females shall be deemed of full and legal age when they shall be eighteen years old, or at any age under eighteen, when, with the consent of the parent, guardian, or other person under whose care or government they may be, they shall have been lawfully married.

Males and females of legal age, as fixed by this act, shall be competent to make contracts, convey real estate, and do all other acts and things that persons of full age may legally do.<sup>2</sup>

MEASURES AND ALTERATIONS.

The party producing a writing as genuine, which has been altered, or appears to have been altered, after its execution, in a part material to the question in dispute, and such alteration is not noted on the writing, shall account for the appearance or alteration. He may show that the alteration was made by another without his concurrence, or was made with the consent of the parties affected by it, or otherwise properly or innocently made. If he do that, he may give the writing in evidence, but not otherwise.

WRITING AND SIGNATURE.

For certain purposes, the "writing" includes printing, or printed paper, and the word "signature," or "subscription," includes the "mark" of a person who cannot write, his name being written near it, and witnessed by a person who writes his own name as a witness.<sup>3</sup>

<sup>1</sup> Wood's Dig. art. 1882.

<sup>2</sup> *Id.* 2811; Laws 1858, p. 108.

<sup>3</sup> See § 647 of Laball's Practice Act, and Wood's Dig. art. 1858.

## ACT OF MARCH 13, 1850, TO REGULATE THE INTEREST OF MONEY.

SECTION 1. When there is no express contract in writing, fixing a different rate of interest, interest shall be allowed at the rate of ten per cent. per annum, for all moneys after they become due on any bond, bill, promissory note, or other instrument of writing, on any judgment recovered before any court in this state, for money lent, for money due on the settlement of accounts, from the day on which the balance is ascertained, and for money received to the use of another.

SEC. 2. Parties may agree in writing for the payment of any rate of interest whatever on money due, or to become due on any contract. Any judgment rendered on such contract shall conform thereto, and shall bear the interest agreed upon by the parties, and which shall be specified in the judgment.

SEC. 3. The parties may, in any contract in writing, whereby any debt is secured to be paid, agree, that if the interest on such debt is not punctually paid, it shall become a part of the principal, and thereafter bear the same rate of interest as the principal debt.

The rule for computing interest is prescribed in the case of *Bacchus v. Minor*, 3 Cal., 231, as follows:

The rule for casting interest where partial payments have been made, is, to apply the payment in the first place to the discharge of the interest then due; if the payment exceeds the interest, the surplus goes toward discharging the principal, and the subsequent interest is to be computed on the balance of the principal remaining. If the payment be less than the interest, the surplus of interest must not be taken to augment the principal, but interest continues on the former principal, until the period when the payments taken together exceed the interest due.

Where an account has been stated by plaintiff, charging interest on both the debt and payments, and rendered to defendant, and no objection made thereto, it is the same as an agreement that the interest should be computed accordingly.

## JUDICIAL DECISIONS.

Gold dust is not *cash* within the meaning of a contract calling for payment of *cash*.<sup>1</sup>

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<sup>1</sup> 1 Cal. 45.

On a sale of chattels, where no time for payment or delivery is agreed upon, delivery and payment are concurrent acts, and neither party can maintain an action for non-performance, without showing a readiness and willingness to perform on his part. Upon part delivery of goods, the vendor is entitled to recover the stipulated price of the quantity actually delivered, although he is unable to deliver the whole quantity sold. But the purchaser is entitled to a reduction therefrom, of the amount of damages he has sustained on account of the non-delivery of the whole.<sup>1</sup>

Where the terms of a verbal contract are reduced to writing, but the written paper is neither signed nor delivered, the written contract will be deemed inchoate and incomplete, and neither party will be bound by it.<sup>2</sup>

Where an agreement is reduced to writing, all stipulations, conditions and provisions relating to the subject matter of the contract, are merged in the writing, except in some special cases. It is an indisputable rule of law that all conversations and intentions of the parties before and at the time of making a written contract, are contained in it; so that the written instrument alone must be looked to for the purpose of collecting its meaning.<sup>3</sup>

A written contract must be construed so as to give effect, if possible, to all parts of it.<sup>4</sup>

Where there has been a special contract to erect a building at a specified price, and according to an agreed plan, and the contract is afterward deviated from by consent, the plaintiff cannot recover upon the express contract, because the work has not been performed according to the terms of the express contract.

But the plaintiff is entitled to compensation, and he can sue upon an implied contract, and the compensation must be graduated, at the trial, by the terms of the contract, so far as the work can be traced under it.<sup>5</sup>

Where the agreements of the party are dependent, neither party can maintain an action against the other, without showing performance, or an offer to perform.<sup>6</sup>

A public officer, who stands in the relation of agent of the

<sup>1</sup> 1 Cal. 51.

<sup>2</sup> Id. 119.

<sup>3</sup> Id. 129; id. 337.

<sup>4</sup> Id. 200.

<sup>5</sup> Id. 206.

<sup>6</sup> Id. 337.

government, or of the public, is not personally liable upon contracts made by him as such officer, and within the scope of his legitimate duties.<sup>1</sup>

A public administrator is personally liable upon contracts made in relation to estates upon which he administers, unless the contract shows that it was not the intention to hold him personally liable.<sup>2</sup>

A contract to pay the plaintiff ninety dollars per month as wages for work and labor, will not include the plaintiff's board.<sup>3</sup>

The designation of a contract by an improper term cannot be allowed to take away a substantial right, where all the circumstances attending it are fully detailed.<sup>4</sup>

A parol agreement to rescind a contract under seal is good, if such parol agreement is executed, and such agreement may be presumed from the acts of the parties.<sup>5</sup>

It is clearly settled that a vendee of goods may avail himself of fraud, breach of warranty, or failure of consideration, by way of defence in any action upon the contract of sale. To avoid circuity of action, the defendant is permitted to set up this defence, either in mitigation of damages, or as a bar.<sup>6</sup>

To constitute a valid sale of personal property against creditors, under the statutes, there must be "an immediate delivery thereof, accompanied with an actual and continuous change of possession. By an *immediate*, is not meant a delivery instanter, but the character of the property sold, its situation, and all the circumstances, must be taken into consideration, in determining whether there was a delivery within a reasonable time, and this will often be a question of fact for the jury.<sup>7</sup>

A party cannot invalidate a fair contract, founded on a sufficient consideration, on the ground of the insanity of one of the parties at the time. That a party is under the influence of liquor at the time of his making the contract is not sufficient to avoid it. Intoxication must be shown to exist to such an extent as to seriously impair the reasoning faculties at the time of the contract, to avoid it.<sup>8</sup>

<sup>1</sup> 1 Cal. 387.

<sup>2</sup> 2 Id. 87.

<sup>3</sup> Id. 439.

<sup>4</sup> Id. 551.

<sup>5</sup> 4 Id. 17.

<sup>6</sup> 5 Id. 226.

<sup>7</sup> Id. 365 & 412.

Where part of the consideration of a contract is illegal, the whole is void.<sup>1</sup>

A person who undertakes the erection of a building, or other work, for his own benefit, is not responsible for injuries to third persons, occasioned by the negligence of a person, or his servants, who are actually engaged in executing the whole work under an independent contract.<sup>2</sup>

The right of selection is the basis of the responsibility of a master or principal for the acts of his agent. No one can be held responsible, as principal, who has not the right to choose the agent from whose act the injury flows.<sup>3</sup>

After acceptance of the work, or construction by the person for whom it was built, he becomes liable for subsequent injuries, having thus assumed the responsibility of its sufficiency; and the liability of the contractors ceases.<sup>4</sup>

Where the party employed receives a regular specific monthly salary for his services, the presumption of the law is, that all services rendered by him for his employer during that period, which are of nearly a similar nature to those of his regular duties, are paid for by his salary. And to overcome this presumption, he must show an express agreement for extra pay, otherwise he cannot recover.<sup>5</sup>

Where a contract is entire, a party cannot abandon one part and hold to another part. To rescind a contract requires the volition and action of both parties.<sup>6</sup>

Where parties contract in respect to a law, the law itself becomes a part of the contract, and they are bound thereby. As where the parties execute a bail-bond, the whole statute respecting bail must be examined to determine the defendant's liability.<sup>7</sup>

#### FORMS.

##### *Contract of Sale of Personal Property.*

Contract made and concluded the twenty-first day of May, one thousand eight hundred and fifty, by and between Jacob Cabot, party of the first part, and Samuel Harkness, party of the second part, in these words: The said party of the second part

<sup>1</sup> 8 Cal. 118.

<sup>2</sup> *Id.* 469.

<sup>3</sup> 9 *Id.* 198.

<sup>4</sup> *Jones v. Post & Co.*, 6 Cal. 102.

<sup>5</sup> *Mattoon v. Eder*, 6 Cal. 57.

covenants and agrees to and with the said party of the first part, to furnish to said party of the first part at the town of Rough and Ready, on or before the first day of July next, three hundred pack-mules, with saddles and all equipments for packing, said mules to be of the average medium size of pack-mules, in good condition, and well broken and trained. And the said party of the first part, covenants and agrees to pay unto the said party of the second part, for the same, the sum of five thousand dollars, lawful money of the United States, as follows: the sum of one thousand dollars on the delivery of said mules, and one thousand dollars each and every month thereafter, until the whole sum of five thousand dollars be paid; and for the true and faithful performance of all and every of the covenants and agreements above mentioned, the parties to these presents bind themselves, each unto the other, in the penal sum of one thousand dollars, as fixed and settled damages, to be paid by the failing party.

In witness whereof, the parties to these presents have hereunto set their hands, the day and year first above written.

Sealed and delivered in presence of } JACOB CABOT.  
GEORGE COULTER. } SAMUEL HARKNESS.

*Agreement for the Sale and Purchase of Personal Property.*

This agreement, by and between E. K., of the city of \_\_\_\_\_, in the county of \_\_\_\_\_, of the first part, and M. B., of \_\_\_\_\_, of the second part, made the \_\_\_\_\_ day of \_\_\_\_\_, one thousand eight hundred and sixty, witnesseth: That the said M. B., in consideration of the agreement hereinafter contained, to be performed by E. K., agrees to deliver to the said E. K., at his warehouse in the city of \_\_\_\_\_, one hundred sacks of barley [or, twenty head of cattle, *as the case may be*], on or before the \_\_\_\_\_ day of \_\_\_\_\_, 18 \_\_\_\_\_. And the said E. K., in consideration thereof, agrees to pay to the said M. B. the sum of \_\_\_\_\_ for each and every \_\_\_\_\_ of the said \_\_\_\_\_ immediately upon the completion of the delivery thereof.

In witness whereof, the parties to these presents have hereunto set their hands and seals, the day and year first above written.

Signed, sealed, and delivered in the } E. K. [L. s.]  
presence of A. P. } M. B. [L. s.]

*Agreement of Barter.*

This agreement, made the \_\_\_\_\_ day of, &c., between A. B., of, &c., and C. D., of, &c., witnesseth: That the said A. B. agrees to sell and deliver to the said C. D., at his store in Mount Ophir, on the \_\_\_\_\_ day of \_\_\_\_\_ instant, fifty ounces of gold dust.

In consideration whereof, the said C. D. agrees to sell and

deliver to the said A. B., at the store-house of G. H., in  
 , on the                      day of  
 aforesaid, one thousand pounds of barley, ten pounds of quick-  
 silver, &c., &c.

In witness, &c.

*Agreement to Sell Stock in a Store.*

This agreement, made the                      day of  
 in the year 1860, between A. B., of, &c., and C. D., of, &c., wit-  
 nesseth: That the said A. B., for the consideration hereinafter  
 specified, agrees to sell to the said C. D., and the said C. D.  
 agrees to buy of the said A. B., all the stock of groceries, dry-  
 goods, hardware, and goods, wares and merchandise belonging  
 to the said A. B., and now being in the store occupied by him,  
 in the town of Grub Flat, together with the furniture and fix-  
 tures, thereunto appertaining, and also all the barley, hams,  
 cheese, potatoes and produce, of every name and nature, bought  
 or contracted for by the said A. B., and intended for sale within  
 the said store. The stock of goods, wares and merchandise is to  
 be inventoried to the said C. D. at the original cost, without in-  
 cluding transportation expenses: and deduction is to be made  
 for any depreciation in value on account of damage, wear or tear:  
 the furniture and fixtures are to be inventoried at their fair cash  
 value, and if the above parties cannot agree as to such valuation,  
 and as to such deduction as aforesaid, the same shall be deter-  
 mined according to the appraisal of E. F., G. H., and I. J., of  
 Grub Flat aforesaid, or a majority of them: the barley, hams,  
 cheese, potatoes and produce, are to be inventoried at their  
 original cost. Said inventory is to be completed within five  
 days from the date hereof, and the property above specified de-  
 livered over to the said C. D. immediately thereupon.

In consideration of the premises, the said C. D. agrees to pay  
 to the said A. B., as and for the purchase money of the above-  
 mentioned property, the sum of five thousand dollars in cash.

And the said A. B. further covenants and agrees, to and with  
 the said C. D., that he will not, at any time hereafter, engage,  
 directly or indirectly, or concern himself, in carrying on or  
 conducting the business of keeping a store in said town of Grub  
 Flat.

And it is expressly understood that the stipulations aforesaid  
 are to apply to and to bind the heirs, executors and administra-  
 tors of the respective parties, and in case of failure, the parties  
 bind themselves, each unto the other, in the sum of one thou-  
 sand dollars, as fixed and settled damages, to be paid by the  
 failing party.

In witness, &c.

*Agreement with a Clerk or Workman.*

This agreement, made the \_\_\_\_\_ day of, &c., between A. B., of, &c., and C. D., of, &c., witnesseth: That the said C. D. covenants and agrees, faithfully, truly and diligently, to write [or work] for the said A. B., as his clerk, [or, journeyman,] in the office [or, shop, or, store] of the said A. B., at \_\_\_\_\_, aforesaid, from the \_\_\_\_\_ day of \_\_\_\_\_ instant, for and during the space of \_\_\_\_\_ : In consideration of which service so to be performed, the said A. B. covenants and agrees to pay to the said C. D. the sum of \_\_\_\_\_ dollars monthly, at the end of each and every month of this contract.

In witness, &c.

*Agreement to Sell and Deliver Cord-Wood, or Stone.*

This agreement, made the \_\_\_\_\_ day of, &c., between A. B., of, &c., and C. D., of, &c., witnesseth: That the said A. B., for the consideration hereinafter mentioned, agrees to sell to the said C. D., five hundred cords of seasoned oak cord-wood, and to deliver, and securely pile the same, on the west bank of the Sacramento River, immediately in the town of Colusa [or, two hundred tons of good quarry stone, suitable for building, and to deliver the same on Pacific wharf, in the city of San Francisco] on or before the \_\_\_\_\_ day of \_\_\_\_\_ next.

In consideration whereof, the said C. D. agrees to pay to the said A. B., the sum of \_\_\_\_\_ for each and every cord of wood, [or, tons of stone,] as aforesaid, upon the final and complete delivery thereof.

In witness, &c.

*Builders' Contract.*

Articles of agreement, made this first day of May, one thousand eight hundred and fifty-nine, between Richard H. Sinton, of the first part, and Alexander H. Houston, of the second part.

1. The said party of the second part does hereby, for himself, his heirs, executors and administrators, covenant, promise and agree with and to the said party of the first part, his executors, administrators and assigns, that he the said party of the second part, his executors or administrators, shall and will, for the considerations hereinafter mentioned, on or before the first day of September next, well and sufficiently erect and finish a new building of brick and stone upon the lot on the corner of \_\_\_\_\_ and \_\_\_\_\_ streets, in the city of San Francisco, agreeable to the



drawings and specifications made by Lewis R. Townsend, architect, and signed by the parties hereunto annexed, within the time aforesaid, in a good, workmanlike and substantial manner, to the satisfaction, and under the direction of the said Lewis R. Townsend, to be testified by a writing or certificate under the hand of the said Lewis R. Townsend, and also shall and will find and provide, such good, proper and sufficient materials, of all kinds whatsoever, as shall be proper and sufficient for completing and finishing all the foundation, walls, floors, ceilings, roofings, and other works of the said building mentioned in the annexed specifications for the sum of ten thousand dollars.

And the said party of the first part, does hereby, for himself, his heirs, executors and administrators, covenant, promise and agree, with and to the said party of the second part, his executors and administrators, that he the said party of the first part, his executors or administrators, shall and will, in consideration of the covenants and agreements being strictly performed and kept by the said party of the second part, as specified, well and truly pay, or cause to be paid, unto the party of the second part, his executors, administrators or assigns, the sum of ten thousand dollars of lawful money of the United States of America. In manner following: [*here state the terms of payment*].

Provided, that in each of the said cases a certificate be obtained and signed by the said Lewis R. Townsend, architect, and it is hereby further agreed by and between the said parties:

1. The specifications and the drawings are intended to co-operate, so that any works exhibited in the drawings and not mentioned in the specifications, or *vice versa*, are to be executed the same as if they were mentioned in the specifications and set forth in the drawings, to the true meaning and intention of the said drawings and specifications.

2. The contractor, at his own proper cost and charges, is to provide all manner of materials and labor, scaffolding, implements, moulds, models, and cartage of every description, for the due performance of the several erections.

3. Should the owner, at any time during the progress of the said building, request any alteration, deviation, additions or omissions, from the said contract, he shall be at liberty to do so, and the same shall in no way affect or make void the contract, but will be added or deducted from the amount of the contract, as the case may be, by a fair and reasonable valuation.

4. Should the contractor, at any time during the progress of the said works, refuse or neglect to supply a sufficiency of materials, or workmen, the owner shall have the power to provide materials and workmen, after three days' notice in writing being given to finish the said works, and the expense will be deducted from the amount of the contract.

5. Should any dispute arise respecting the true construction or meaning of the drawings or specifications, the same shall be decided by Henry A. Cobb and A. A. Selover, and their decision shall be final and conclusive; but should any dispute arise respecting the true value of the extra work or works omitted, the same shall be valued by two competent persons—one employed by the owner and the other by the contractor—and those two shall have power to name an umpire, whose decision shall be binding on all parties.

6. The owner shall not, in any manner, be answerable or accountable for any loss or damage that shall or may happen to the said works, or any part or parts thereof respectively, or for any of the materials or other things used and employed in finishing and completing the same (loss or damage by fire excepted), until the said building is completed.

In witness whereof, the said parties to these presents have heretunto set their hands the day and year first above written.

Signed and sealed in the  
presence of

RICHARD H. SINTON.  
ALEXANDER H. HOUSTON.

*Agreement for Building a House—short Form.*

This agreement made the            day of           , one thousand eight hundred and           , by and between A. B., of, &c., of the first part, and C. D., of, &c., of the second part, witnesseth: That the said party of the second part, covenants and agrees, to and with the said party of the first part, to make, erect, build and finish, in good, substantial, and workmanlike manner, on the fifty vara lot of the said party of the first part, situate on Hyde street, in the city of San Francisco, a dwelling-house, agreeable to the draft, plan, and explanation, hereto annexed, of good substantial materials [*if the materials are to be furnished by the party of the first part, say: of such materials as the said party of the first part shall find or provide for the same*], by the day of            next.

And the said party of the first part covenants and agrees to pay unto the party of the second part, for the same, the sum of            dollars, lawful money of the United States, as follows: the sum of            dollars in thirty days from the date hereof, and the remaining sum of            dollars, when the said dwelling-house shall be completely finished. [*If necessary, add: And also, that he will furnish and procure the necessary materials for the said work, in such reasonable quantities, and at such reasonable time or times, as the said party of the second part shall or may require.*]

And for the true and faithful performance of all and every of the covenants and agreements above mentioned, the parties to

these presents bind themselves, each unto the other, in the penal sum of            dollars, as fixed and settled damages, to be paid by the failing party.

In witness, &c.

*Agreement with a Mason.*

This agreement, made the            day of, &c., between A. B., of, &c., and C. D., of, &c., witnesseth: That the said C. D., for the consideration hereinafter mentioned, promises and agrees, to and with the said A. B., that he will do and perform, by himself or persons in his employ, in a good and workmanlike manner, and with materials to be furnished by the said A. B., all the mason and plastering work to be done in and about the erecting and building a new dwelling-house on the fifty vara lot No. 200, of the said A. B., on California street, in the city of San Francisco, according to the plans and specifications hereto annexed; and also, that he will use the utmost care in working up the materials to be furnished by the said A. B., as aforesaid, to the best advantage for the said A. B.; and that he will complete the said work on or before the            day of            next.

And the said A. B., in consideration of the premises, agrees to furnish and provide good and sufficient materials for the said work, at such time or times as the said C. D. may request; and to pay the said C. D. for all such work as shall be performed by him or his servants in and about the said new dwelling-house, ornamental work excepted, on the completion of the same, at and after the rate of            per yard of three feet square, and the sum of            dollars for all the ornamental work done or performed in and about the said dwelling-house—it being expressly understood and agreed, that no extra charge is to be demanded or allowed, for corners, arches, jams, joints, fire-places, or any other kind of work not strictly ornamental, but all the work is to be measured as plain, except the ornamental work to be paid for, as aforesaid, in gross.

In witness, &c.

*Party-Wall Agreement.*

This agreement made and entered into at the city of San Francisco, this            day of           , A. D. one thousand eight hundred and sixty, between Albert L. Bancroft, Charles J. Leonard, and Frederick Whittram, of the said city, of the first part, and John C. Barnes, of the city of New York, of the second part, witnesseth: That whereas the said parties of the first part are the owners of a lot of land [*insert description*], and whereas the said party of the second part, is the owner of the adjoining lot of land upon

the easterly side thereof, and whereas the said parties purpose to improve their said lots by the erection of brick or stone buildings thereon, and the said parties of the first part have commenced erecting such improvement on their said land, under a verbal agreement, that the walls to be erected on their division lines should be erected equally upon their several lots; and whereas, the respective parties are desirous of having their said agreement reduced to writing; now, therefore, in consideration of the premises, it is agreed by and between the parties to these presents, that the said parties of the first part shall have the immediate possession and use of one of the portions of the lot of the said party of the second part, convenient or necessary for the purpose aforesaid, and shall construct thereupon, in a good and workmanlike manner, upon a foundation to be substantially piled and capped, a wall or walls, one-half whereof shall be upon the land of said party of the second part, and one-half upon the land of said parties of the first part, and running southerly from street sixty feet and six inches, on the division line of the lots aforesaid, to be built of good building stone or brick, of the thickness of sixteen inches from the base to the second story, to the height of twenty-four feet, and of the thickness of twelve inches from the second floor upward to the height of twenty feet, including the second and third stories; the whole to be capped with a fire-wall of the thickness of eight inches to the height of two feet. The whole of said wall to be of the depth of sixty feet and six inches.

And the said party of the second part doth hereby covenant, promise, and agree to and with the said parties of the first part, that after the said wall shall be erected, finished, and ready for use, whenever he shall use the whole or any part thereof for the construction of a brick or stone building, that he will pay to the said parties of the first part, on demand, the one-half part of the value of so much and such part of said party-wall, including the made foundation thereof, as he shall make use of; and in case the parties hereto cannot agree and determine as to the amount to be paid by the said party of the second part for the use of said party-wall, then such amount shall be ascertained and determined by arbitration; the parties of the first part to appoint one arbitrator, and the party of the second part to appoint one arbitrator, and in case said arbitrators cannot agree and determine upon such value, they shall themselves appoint a third arbitrator; and the decision of any two of said arbitrators, delivered in writing, shall be conclusive and binding upon the parties hereto.

And the said parties to these presents do hereby mutually covenant and agree, that if it shall thereafter become necessary to repair any portion of the said party-wall, the expense of such repairing shall be borne equally by the parties hereto; and if it

shall hereafter become necessary to rebuild such party-wall, or any portion thereof, by reason of its destruction by fire or other calamity, in that event, either party shall be at liberty to rebuild the same, and the expense of rebuilding shall in the first instance be borne by the party rebuilding; and whenever the other party shall desire to make use of the wall so rebuilt, or any part thereof, he shall be at liberty to do so upon paying to the party rebuilding, on demand, one-half of the value of the wall rebuilt, or of such portion thereof as said party shall desire to use at the time he shall so desire to use the same. And if the parties hereto cannot agree upon the price to be paid to the party desiring the use thereof, the same shall be determined and fixed by arbitration, as hereinbefore provided, for ascertaining the amount to be paid on the first use of said party-wall; and that whenever said party-wall shall be rebuilt, it shall be erected on the same spot where it shall be erected under this agreement, and shall be of the same dimensions, and of the same or similar materials.

And it is hereby mutually agreed by and between the parties to these presents, that in case either party shall, at any time, desire to erect said party-wall to any greater height than the same shall be erected as aforesaid, said party shall be at liberty to do so, either upon the whole width of said wall or upon that portion thereof which corresponds with his portion of the land upon which said wall shall then stand; and in case said party shall erect to a greater height, either upon the whole width, or on such portion thereof, such erection shall in the first instance be at the expense of the party building, and in case either party shall continue such higher erection the whole width of said party-wall, whenever the other party shall desire to use the same he shall be at liberty to do so, upon paying to the other on demand one half of the value of said higher erection, or of so much thereof as he shall make use of, at the time when he shall so make use of the same; and in the event the said parties hereto cannot agree and determine on said value, it shall be determined and fixed by arbitration, in the manner hereinbefore provided for ascertaining the amount to be paid for the first use of the wall to be settled in pursuance of this agreement.

And the said parties to these presents do hereby mutually covenant and agree, for and with themselves and their respective heirs and assigns, that the whole of the wall above-mentioned shall be and remain as a party-wall, to be continued and used as such forever.

And it is further mutually understood and agreed, by and between the parties hereto, that this agreement shall be perpetual, and at all times be construed into a covenant running with the land; and that no part of the fee of the soil upon which said

wall shall be erected, belonging to the said parties of the first part, shall pass to the said party of the second part; and that no part of the fee of the soil upon which said wall shall be erected, belonging to said party of the second part, shall pass to said parties of the first part, or to the respective heirs or assigns of said parties, or be vested in them or either of them, in or by these presents.

And it is mutually understood, that the stipulations and agreements aforesaid are to apply to and bind the heirs, executors, administrators, and assigns of the respective parties.

In witness whereof, the respective parties to these presents, have hereunto, and to a duplicate hereof, interchangeably set their hands and seals, the day and year first above written.

Witness, J. W. J. PIERSON.

CHAS. J. LEONARD. [L. s.]

ALBERT L. BANCROFT. [L. s.]

FREDERICK WHITTRAM. [L. s.]

JOHN C. BARNES. [L. s.]

By his attorney in fact, AARON JOHNSON.

#### *Party-Wall Agreement—short Form.*

This agreement, made the                      day of, &c., between A. B., of, &c., and C. D., of, &c., witnesseth: That whereas the said A. B. is the owner of the lot and store known as number                      street; in the city of Sacramento; and the said C. D. is the owner of the lot adjoining the same on the northerly side thereof, on which last-mentioned lot the said C. D. is about to erect a brick store; now, therefore, the said A. B., in consideration of the sum of                      dollars, to him in hand paid, the receipt whereof is hereby acknowledged, doth for himself, his heirs, executors, administrators, and assigns, covenant, grant, promise, and agree to and with the said C. D., his heirs, executors, administrators, and assigns, that he, the said C. D., his heirs and assigns, shall and may, in the erection of the brick store about to be built, as aforesaid, freely and lawfully, but in a workmanlike manner, make use of the northerly gable-end wall of the said A. B., or so much thereof as the said C. D., his heirs or assigns, may desire as a party-wall, to be continued and used as such forever.

And the said A. B. and C. D. do hereby mutually covenant and agree for and with themselves, and their respective heirs and assigns, that if it shall hereafter become necessary to repair or rebuild the whole or any portion of the said party-wall, the expense of such repairing or rebuilding shall be borne equally by the said A. B. and C. D., their respective heirs and assigns, as to so much and such portion of the said wall as the said C. D., his heirs and assigns, shall or may use for the purposes aforesaid; and that whenever the said party-wall, or any portion thereof, shall be re-

built, it shall be erected on the same spot where it now stands, and be of the same size, and the same or similar materials, and of like quality with the present wall.

It is further mutually understood and agreed between the aforesaid parties, that this agreement shall be perpetual, and at all times be construed into a covenant running with the land; and that no part of the fee of the soil upon which the wall of the said A. B. above described, now stands, shall pass to, or be vested in, the said C. D. his heirs and assigns, in or by these presents.

In witness, &c.

*Agreement to Sell Shares of Stock in an Incorporated Company.*

This agreement, made the                      day of, &c., between A. B., of, &c., and C. D., of, &c., witnesseth: That the said A. B. agrees to sell and convey to the said C. D., on or before the                      day of                      , next, one hundred shares of the capital stock of the California Steam Navigation Company, now owned and held by the said A. B., and standing in his name on the books of the said company, and to make and execute unto the said C. D. all assignments, transfers and conveyances necessary to assure the same to him, his heirs, and assigns.

In consideration whereof, the said C. D. agrees to pay unto the said A. B., for each and every share of such stock, the average cash market price of the same, for and during twenty days preceding the                      day of                      , aforesaid, to be determined by the sales made in the city of San Francisco.

In witness, &c.

*Agreement, or Subscription, for Raising Money to Build a Church or other Work.*

We, the undersigned, do hereby severally promise and agree to pay to A. B., C. D., and E. F., the trustees of the Calvary Presbyterian Church and Congregation Society, in the city of San Francisco, the sums set opposite to our respective names, on demand [*or as the terms of payment may be*], for the purpose of building a church or place of worship for the said society in the city of San Francisco, aforesaid; and we request the said trustees to contract for the building of such church or place of worship, and to build the same, and to apply the sums of money hereto subscribed in payment therefor.

Witness our hands, this                      day of                      , 1854.

NAMES.	AMOUNT.
J. B. R. . . . .	\$1000 00
H. P. C. . . . .	500 00
J. M. . . . .	750 00

*Agreement to Cultivate Land on Shares.*

This agreement, made the \_\_\_\_\_ day of, &c., between A. B., of, &c., and C. D., of, &c., witnesseth: That the said A. B. agrees that he will break up, plough, properly fit and sow with wheat, all that field belonging to the said C. D., lying immediately north of the town of Santa Clara aforesaid, and containing two hundred acres or thereabouts, on or before the fifth day of September next; that when the said crop, to be sown as aforesaid, shall be in fit condition, he will cut, harvest and properly thresh, clean and sack the same, and deliver one half of the wheat, being the produce thereof, to the said C. D., at \_\_\_\_\_, on or before the \_\_\_\_\_ day of \_\_\_\_\_, in the year 1859.

It is understood between the parties, that one half of the seed wheat is to be found by the said C. D.; that the said A. B. is to perform all the work and labor necessary in the premises, or cause it to be done; and that the straw is to remain upon the ground and be the property of said A. B.

In witness, &c.

*Cancelling Agreement.*

This agreement, made this \_\_\_\_\_ day of \_\_\_\_\_, A. D. \_\_\_\_\_, between A. of the first part, and B. and C. of the second part, witnesseth:

Whereas, on \_\_\_\_\_ A. D. 1857, both the said parties mutually agreed in writing, among other things, to this, namely: the party of the first part to devote his whole time and attention for \_\_\_\_\_ years from said \_\_\_\_\_ A. D. 1857, to the care and management of certain real estate (in said agreement in writing more particularly described), and the buildings thereon, and the business there done and transacted, and the parties of the second part to employ the party of the first part, as aforesaid, and for the said term of \_\_\_\_\_ years.

And whereas it is deemed desirable by all the parties hereto, that the said care, management and employment of the party of the first part by the parties of the second part, should end and determine from this date.

Now, therefore, both parties hereto assent to the said ending and determination of the said care, management and employment.

And the party of the first part does hereby discharge, release and acquit the parties of the second part, of and from all obligation and liability, to him, the party of the first part, by reason of the said employment, or of any salary due or to become due, by reason thereof.



And the parties of the second part hereby release, acquit and discharge the party of the first part, of and from any obligation or liability, by reason of his agreement for the care and management of the said real estate, property and business as aforesaid, or of the acts of any person hereafter employed by the parties of the second part, in the care and management thereof, during the said unexpired term :

And they also agree that the party of the first part may have access to the books, papers and accounts of the management of said real estate, property and business, kept during the management thereof by the party of the first part.

In witness whereof, &c., &c.

## CHAPTER XIV.

## CORONER.

## STATUTORY PROVISIONS.

It is provided that one coroner shall be elected from each county, to serve for two years, and to give bond in the sum of five thousand dollars.<sup>1</sup> In some of the counties his bond is fixed at a different amount, and in some his office is united with that of public administrator.<sup>2</sup>

In San Francisco his bond is given under the provisions of the consolidation act, and his compensation in the form of a salary.<sup>3</sup> He is allowed a sum not to exceed fifty dollars per month for making analyses, and for interments not exceeding ten dollars in each case.<sup>4</sup>

The coroner shall perform the duties of sheriff in all cases where the sheriff is interested, or otherwise incapacitated from serving; and also in cases of a vacancy by death, resignation, or otherwise, in the office of sheriff, the coroner shall discharge the duties of such office until a sheriff is elected and qualified. When both are parties to the action, or when either one is prosecuted for disobedience, an elisor may be appointed.<sup>5</sup>

Whenever the coroner acts as sheriff, he shall possess the powers and responsibilities, and perform all the duties of sheriff, and shall be liable on his official bond in like manner as a sheriff would be, and shall be entitled to the same fees as are allowed by law to the sheriff for similar services.<sup>6</sup>

When a coroner has been informed that a person has been killed, or has committed suicide, or has suddenly died under such circumstances as to afford a reasonable ground to suspect that his

<sup>1</sup> Wood's Dig. art. 2852, 2861 and 496.

<sup>2</sup> Laws 1856, p. 28 and 156; Laws 1859.

<sup>3</sup> Laws 1857, p. 212.

<sup>4</sup> Laws 1853, p. 39.

<sup>5</sup> Wood's Dig. art. 437 and 3271-3274; Laws 1859, p. 8.

<sup>6</sup> Wood's Dig. art. 428 and 3272.

death has been occasioned by the act of another, by criminal means, he shall go to the place where the body is, and forthwith summon not less than nine, nor more than fifteen persons, qualified by law to serve as jurors, to appear before him forthwith at the place where the body of the deceased is, to inquire into the cause of the death.<sup>1</sup>

Every person summoned as a juror who shall fail to appear without having a reasonable excuse, shall forfeit any sum not exceeding one hundred dollars, to be recovered by the coroner in the name of the people of the state, before any justice of the peace, in the proper township, and when collected, to be paid over to the county treasurer for the use of the county.<sup>1</sup>

When six or more of the jurors attend, they shall be sworn by the coroner to inquire who the person was, and when, where, and by what means he came to his death, and into the circumstances attending his death; and to render a true verdict thereon, according to the evidence afforded them, or arising from the inspection of the body. If a juror neglect or refuse to attend, he may be fined in the sum of fifty dollars.<sup>2</sup>

The coroner may issue subpoenas for witnesses, returnable forthwith, or at such time and place as he may appoint, which may be served by any competent person. He must summon and examine as witnesses, every person, who, in his opinion, or that of any of the jury, has any knowledge of the facts, and he may summon a surgeon or physician to inspect the body, and give a professional opinion as to the cause of the death.<sup>3</sup>

A witness served with a subpoena may be compelled to attend and testify, or punished by the coroner for disobedience, in like manner as upon a subpoena issued by a justice of the peace.<sup>3</sup>

After inspecting the body and hearing the testimony, the jury shall render their verdict and certify the same by an inquisition in writing, signed by them, and setting forth who the person killed is, and when, where and by what means he came to his death; and if he was killed, or his death occasioned by the act of another by criminal means, who is guilty thereof.<sup>3</sup>

The testimony of the witnesses examined before the coroner's jury shall be reduced to writing by the coroner, or under his

<sup>1</sup> Wood's Dig. art. 429 and 430.

<sup>2</sup> Id. 433-447.

<sup>3</sup> Id. 431 and 2709, §§ 28 and 29.

direction, and shall be forthwith filed by him, with the inquisition, in the office of the clerk or the district court of the county.<sup>1</sup>

If, however, the person charged with the commission of the offence be arrested before the inquisition can be filed, the coroner shall deliver the same, with the testimony taken, to the magistrate before whom such person may be brought, who shall return the same, with the depositions and statement taken before him, to the office of clerk of the district court of the county.<sup>1</sup>

If the jury find that the person was killed by another, under circumstances not excusable or justifiable by law, or that his death was occasioned by the act of another by criminal means, and the party committing the act be ascertained by the inquisition, and be not in custody, the coroner shall issue a warrant, signed by him, with his name of office, into one or more counties, as may be necessary for the arrest of the person charged.<sup>1</sup>

The coroner's warrant may be served in any county, and the officer serving it shall proceed thereon in all respects as upon a warrant of arrest on an information before a magistrate, except that when served in another county, it need not be endorsed by a magistrate of that county.<sup>1</sup>

The coroner must, within thirty days after an inquest upon a dead body, deliver to the county treasurer any money or other property which may be found upon the body, unless claimed in the mean time by the legal representatives of the deceased. If he fail to do so, the treasurer may proceed against the coroner, to recover the same, by a civil action in the name of the county.<sup>1</sup>

Upon the delivery of money to the treasurer, he shall place it to the credit of the county. If it be other property, he shall, within thirty days, sell it at public auction, upon reasonable public notice, and shall, in like manner, place the proceeds to the credit of the county.<sup>1</sup>

If the money in the treasury be demanded within six years by the legal representatives of the deceased, the treasurer shall pay it to them, after deducting the fees and expenses of the coroner and of the county in relation to the matter, or the same may be so paid at any time thereafter, upon the order of the Court of Sessions of the county.<sup>1</sup>

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<sup>1</sup> Wood's Dig. art. 438-447.

Before auditing and allowing the account of the coroner, the Court of Sessions<sup>1</sup> shall require from him a statement in writing, of any money or other property found upon persons on whom inquests have been held by him, verified by his oath, to the effect that the statement is true, and that the money or property mentioned in it has been delivered to the legal representatives of the deceased or to the county treasurer.<sup>1</sup>

If the office of coroner be vacant, or he be absent, or unable to attend, the duties of his office may be performed by any justice of the peace of the county, with the like authority, and subject to the same obligations and penalties as the coroner.<sup>1</sup>

In the counties of San Diego, Los Angeles, Santa Barbara, San Luis Obispo, Sonoma, Santa Clara, Monterey, a coroner shall receive five dollars for each inquest he may hold, and twenty cents for each mile necessarily travelled to hold an inquest. In all other counties of the state a coroner shall receive ten dollars for each inquest he may hold, and twenty-five cents for each mile necessarily travelled to hold an inquest. Coroners' fees shall be county charges.<sup>1</sup>

A justice of the peace acting as coroner, shall be entitled to the same fees, payable in the same manner.<sup>1</sup>

When an inquest shall be held by the coroner, and no person shall offer to take charge of the body of the deceased, it shall be his duty to cause said body to be decently interred, and in case that there shall not be sufficient property belonging to the estate of the deceased to pay the necessary expenses of the said burial, said expenses shall be a legal charge upon his county. The coroner shall be entitled to receive the sum of two dollars out of his county treasury, for attending to the burial of such dead body.<sup>2</sup>

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<sup>1</sup> Wood's Dig. art. 438-447.

<sup>2</sup> This provision in relation to money or other property of the deceased, controlled by the statute authorizing the Public Administrator to take charge of such effects, and by the decision of the Supreme Court, declaring that the jurisdiction of the Court of Sessions is limited to criminal matters only.

## FORMS.

*Coroner's Subpœna for Jurors.*

State of California, }  
 County of San Francisco, } ss:

The People of the State of California send greeting:  
 To Mr. A. B.:

We command you that, all and singular business and excuses being laid aside, you be and appear before J. M. McNulty, county coroner for the county of San Francisco, at the police judges' court-room, on the first day of May, 1859, at seven o'clock, P. M., then and there to serve as a juror, in a certain inquisition now pending before said county coroner—and herein fail not, or answer the contrary, at your peril.

Given under my hand, this first day of May, A. D. 1859.

J. M. McNULTY, County Coroner.

*Coroner's Subpœna for Witnesses.*

State of California, }  
 County of San Francisco, } ss:

The People of the State of California send greeting:  
 To Mr. John Minn:

We command you that, all and singular business and excuses being laid aside, you be and appear before J. M. McNulty, county coroner for the county of San Francisco, at my office, on the fifth day of July, 1859, at twelve o'clock M., then and there to testify and give evidence in a certain inquisition now pending before said county coroner—and herein fail not, or answer the contrary at your peril.

Given under my hand, this second day of July, A. D. 1859.

J. M. McNULTY, County Coroner.

*Coroner's Subpœna for a Surgeon or Physician.*

State of California, }  
 City and County of San Francisco, } ss: .

The People of the State of California send greeting:  
 To William A. Douglass, M. D.:

We command you that, all and singular business and excuses being laid aside, you be and appear before the undersigned, county coroner for the city and county of San Francisco, at \_\_\_\_\_, on the \_\_\_\_\_ day of \_\_\_\_\_, 18\_\_\_\_, at \_\_\_\_\_ o'clock, then and there to inspect the body of a certain deceased person, and to testify and give







## CHAPTER XV.

## CORPORATIONS.

CONSTITUTIONAL PROVISIONS.<sup>1</sup>

CORPORATIONS may be formed under general laws, but shall not be created by special acts, except for municipal purposes.

All general laws and special acts passed pursuant to this section may be altered from time to time or repealed.

Dues from corporations shall be secured by such individual liability of the corporators and other means, as may be prescribed by law.

The term corporations, as used in this article, shall be construed to include all associations and joint-stock companies, having any of the powers or privileges of corporations not possessed by individuals or partnerships. And all corporations shall have the right to sue, and shall be subject to be sued, in all courts, in like cases, as natural persons.

The legislature shall have no power to pass any act granting any charter for banking purposes; but associations may be formed, under general laws, for the deposit of gold and silver; but no such associations shall make, issue, or put in circulation, any bill, check, ticket, certificate, promissory note, or other paper, or the paper of any bank, to circulate as money.

The legislature of this state shall prohibit by law any person or persons, associations, company, or corporation from exercising the privileges of banking, or creating paper to circulate as money.

Each stockholder of a corporation, or joint-stock association, shall be individually and personally liable for his proportion of all its debts and liabilities.

It shall be the duty of the legislature to provide for the organ-

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<sup>1</sup> Const. Cal. art. 4, §§ 81-87.

ization of cities and incorporated villages, and to restrict their power of taxation, assessment, borrowing money, contracting debts, and loaning their credit, so as to prevent abuses in assessment and in contracting debts by such municipal corporations.

#### STATUTORY PROVISIONS.

A serviceable outline of the statutes concerning corporations would be nearly of equal length with the statutes themselves. The following selection includes the general corporation law, the law concerning steam navigation, water, and telegraph companies, agricultural societies, and benevolent, religious, and literary associations, with portions of the acts concerning plank-road insurance, and mechanical mining, commercial, &c., companies, sufficient to show respectively their modes of organization, their principal authority, and the personal liabilities of their members.

##### ACT OF APRIL 22, 1859, CONCERNING CORPORATIONS.<sup>1</sup>

SECTION 1. Every corporation, as such, has power: 1. To have succession by its corporate name, for the period limited, and when no period is limited, perpetually. 2. To sue and be sued in any court. 3. To make and use a common seal, and alter the same at pleasure. 4. To hold, purchase, and convey such real and personal estate as the purposes of the corporation shall require, not exceeding the amount limited by law. 5. To appoint such subordinate officers and agents as the business of the corporation shall require, and to allow them a suitable compensation. 6. To make by-laws not inconsistent with any existing law, for the management of its property, the regulation of its affairs, and for the transfer of its stock.

SEC. 2. In addition to the powers enumerated in the preceding section, and to those expressly given in the chapter of this act under which it shall be incorporated, no corporation shall possess or exercise any corporate powers, except such as shall be necessary to the exercise of the powers so enumerated and given.

SEC. 3. No corporation created, or to be created, shall, by any

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<sup>1</sup> Wood's Dig. p. 115.

implication or construction, be deemed to possess the power of discounting bills, notes or other evidences of debt, of receiving deposits, of buying gold or silver, bullion or foreign coin; of buying and selling bills of exchange, of issuing bills, notes or other evidences of debt, upon loans, or for circulation as money.

SEC. 4. Where the whole capital of a corporation shall not have been paid in, and the capital paid shall be insufficient to satisfy the claims of its creditors, each stockholder shall be bound to pay, on each share held by him, the sum necessary to complete the amount of such share as fixed by the charter of the company, or such proportion of that sum as shall be required to satisfy the debts of the company.

SEC. 5. When the corporate powers of any corporation are directed to be exercised by any particular body or number of persons, a majority of such body or persons shall be a sufficient number to form a board for the transaction of business, and every decision of a majority of the persons duly assembled as a board, shall be valid as a corporate act.

SEC. 6. If any corporation hereafter formed shall not organize and commence the transaction of its business within one year from the date of its incorporation, its corporate powers shall cease.

SEC. 7. All corporations may, by their by-laws, where no other provision is specially made, determine the manner of calling and conducting their meetings, the number of members that shall constitute a quorum, the number of shares that shall entitle the members respectively to one or more votes, the mode of voting by proxy, the mode of selling shares for the non-payment of assessments, and the tenure of office of the several officers; and they may prescribe suitable penalties for the violation of their by-laws, not exceeding, in any case, one hundred dollars for any one offence.

SEC. 8. The first meeting of every corporation, where no other provision is specially made, shall be called by a notice, signed by one or more of the persons named in, or associated as incorporators under the law by which it is incorporated, setting forth the time, place and purposes of the meeting; and such notice shall, at least twenty days before the meeting, be delivered to each member, or published in some newspaper of the county

where the corporation shall be established, or if no newspaper be published in the county, then in some newspaper nearest thereto.

Sec. 9. Whenever, by reason of the death, absence or other legal impediment of the officers of any corporation, there shall be no person duly authorized to call or preside at a legal meeting thereof, any justice of the peace of the county where such corporation is established, may, on written application of three or more of the members thereof, issue a warrant to either of the said members, directing him to call a meeting of the corporation, by giving such notice as shall have been previously required by law, and the justice may, in the same warrant, direct such person to preside at such meeting until a clerk shall be duly chosen and qualified, if there shall be no other officer present legally authorized to preside thereat.

Sec. 10. When all the members of a corporation shall be present at any meeting, however called or notified, and shall sign a written consent thereto on the record of such meeting, the doings of such meeting shall be as valid as if legally called and notified.

Sec. 11. The members of such corporation, when so assembled, may elect officers to fill all vacancies then existing, and may act upon such other business as might lawfully be transacted at regular meetings of the corporation.

Sec. 12. Whenever the capital stock of any corporation is divided into shares, and certificates thereof are issued, such shares may be transferred by endorsement and delivery of the certificates thereof, such endorsement being by the signature of the proprietor, or his attorney or legal representative; but such transfer shall not be valid, except between the parties thereto, until the same shall have been so entered on the books of the corporation as to show the names of the parties by and to whom transferred, the number and designation of the shares, and the date of the transfer.

Sec. 13. It shall not be lawful for the directors or managers of any incorporated company in this state to make dividends, excepting from the surplus profits arising from the business of such corporation; and it shall not be lawful for the directors of any such company to divide, withdraw or in any way pay to the stockholders or any of them, any part of the capital stock of such

company, or to reduce the said capital stock, without the consent of the legislature; and in case of any violation of the provisions of this section, the directors, under whose administration the same may have happened, except those who may have caused their dissent therefrom to be entered at large on the minutes of the said directors at the time, or were not present when the same did happen, shall in their individual and private capacity jointly and severally be liable to the said corporation, and to the creditors thereof in the event of its dissolution, to the full amount of the capital stock of the company so divided, withdrawn, paid out or reduced, and no statute of limitations shall be a bar to any suit against such directors for any sums for which they are made liable by this section; *provided*, that this section shall not be construed to prevent a division and distribution of the capital stock of such company which shall remain after the payment of all its debts, upon the dissolution of such company, or the expiration of its charter.

SEC. 14. The total amount of the debts which any incorporated company shall owe, shall not at any time exceed the amount of the capital stock actually paid in; and in case of any excess, the directors under whose administration the same may have happened, except those who may have caused their dissent therefrom to be entered at large on the minutes of the said directors at the time, and except those who were not present when the same did happen, shall, in their individual and private capacities jointly and severally be liable for such excess to the said corporation, and in the event of its dissolution, to any of the creditors thereof to the full amount of such excess, with legal interest from the time such liability accrued, and no statute of limitation shall be a bar to any suit against such directors for any sums of money for which they are made liable by this section.

SEC. 15. Upon the application of any persons, or body incorporate, that may be aggrieved by, or may complain of, any election held by any corporate body, or any proceeding, act, or matter in or touching the same, it shall be the duty of the district judge of the district in which such election is held (reasonable notice having been given to the adverse party, or to those who are to be affected thereby, of such intended application,) to proceed forthwith and in a summary way to hear the affidavits,

proofs and allegations of the parties, or otherwise inquire into the matters or causes of complaint, and thereupon to establish the election so complained of, or to order a new election, or make such order and give such relief in the premises as right and justice may appear to the said district judge to require; *provided*, that the said judge may, if the case appear to require it, direct the district attorney of his district to exhibit one or more information or informations in the nature of a *quo warranto* in the premises.

SEC. 16. Upon the dissolution of any corporation, unless other persons shall be appointed by the legislature, or by some court of competent authority, the directors or managers of the affairs of such corporation at the time of its dissolution, by whatever name they may be known in law, shall be the trustees of the creditors and stockholders of the corporation dissolved, and shall have full power to settle the affairs of the corporation, collect and pay the outstanding debts, and divide among the stockholders the moneys and other property that shall remain after the payment of the debts and necessary expenses.

SEC. 17. The persons so constituted trustees shall have authority to sue for and recover the debts and property of the dissolved corporation, by the name of the trustees of such corporation, and shall have full power to settle the affairs of the corporation, and shall be jointly and severally responsible to the creditors and stockholders of such corporation to the extent of its property and effects that shall come into their hands.

SEC. 18. Upon the dissolution of any corporation, the district court of the county in which the corporation carries on its business, or has its principal place of business, on application of any creditor of the corporation, or of any stockholder or member thereof, may appoint one or more persons to be receivers or trustees of and for the corporation, to take charge of the estate and effects thereof, and to collect the debts and property due and belonging to the corporation, and the power of such receivers may be continued as long as the court shall think necessary.

SEC. 19. The said court shall have jurisdiction of such application, and of all questions arising in the proceedings thereon and may make such orders, injunctions and decrees thereon as justice shall require.

SEC. 20. When any judgment shall have been recovered

against any turnpike or other corporation authorized to receive toll, the franchises of such corporation, with all the rights and privileges thereof, together with all their corporate property, both real and personal, may be taken on execution and sold at public auction.

SEC. 21. The officer having such execution against any corporation mentioned in the preceding section, shall, thirty days at least before the day of sale of the franchise or other corporate personal property, give notice of the time and place of sale, by posting up a notice thereof in the county in which the clerk, treasurer, or any one of the directors of the corporation may dwell, and also by causing an advertisement of the sale, expressing the name of the creditor, the amount of the execution, and the time and place of sale, to be inserted three weeks successively in some newspaper published in any county in which either of the aforesaid officers may dwell, if any such there be: and if no newspaper be published in any such county, then in the newspaper published nearest thereto.

SEC. 22. The officer who may levy any execution, as prescribed in the preceding section, may adjourn the sale from time to time, as may be necessary, until the same shall be completed.

SEC. 23. In the sale of any franchise of any corporation, the person who shall satisfy the execution, with all legal fees and expenses thereon, and shall agree to take such franchise for the shortest period of time, and to receive during that time, all such tolls as the said corporation would by law be entitled to demand, shall be considered the highest bidder.

SEC. 24. The officer's return on such execution, shall transfer to the purchaser all the privileges and immunities which by law belonged to the corporation so far as relates to the right of demanding toll; and the officer shall, immediately after such sale, deliver to the purchaser, possession of all the toll-houses and gates belonging to such corporation, in whatever county the same may be situated, and the purchaser may thereupon demand and receive all the toll which may accrue during the time limited by the terms of his purchase, in the same manner and under the same regulations as such corporation was before authorized to demand and receive the same.

SEC. 25. Any person who may have purchased, or shall here-

after purchase, under the provisions of this chapter, the franchise of any turnpike or other corporation, and the assignees of such purchase may recover any penalties imposed by law for an injury, to the franchise, or for any other cause, and which such corporation would have been entitled to recover during the time limited in the said purchase of the franchise, and during that time the corporation shall not be entitled to prosecute for such penalties.

SEC. 26. The corporation whose franchise shall have been sold as aforesaid, shall, in all other respects, retain the same powers, and be bound to the discharge of the same duties, and liable to the same penalties and forfeitures as before such sale.

SEC. 27. Such corporation may, at any time within one year after such sale, redeem the franchise, by paying or tendering to the purchaser thereof the sum that he shall have paid therefor, with ten per cent. interest thereon, but without any allowance for the toll which he may have received; and, upon such payment or tender, the said franchise and all the rights and privileges thereof, shall revert and belong to said corporation, as if no such sale had been made.

SEC. 28. All the proceedings aforesaid respecting the levy of executions, may be had in any county in which either the creditor, or the president, or any director, or the treasurer, or the clerk of the corporation may reside, or in which the corporation has personal or real estate.

SEC. 29. It shall be the duty of the attorney-general or district attorney, whenever, and as often as shall be required by the governor, to examine into the affairs and condition of any corporation in this state, and report such examination in writing, together with a detailed statement of facts to the governor, who shall lay the same before the legislature; and, for that purpose, the said attorney-general or district attorney shall have power to administer all necessary oaths to the directors and officers of any corporation, and to examine them on oath in relation to the affairs and condition thereof, and to examine the books, papers and documents belonging to such corporation, or appertaining to its affairs and condition; and the legislature, or either branch thereof, shall have full power to examine into the affairs and condition of any corporation in this state at all times; and, for that purpose, any committee appointed by the legislature, or



either branch thereof, shall have full power to administer all necessary oaths to the directors, officers and stockholders of such corporation, and to examine them on oath in relation to the affairs and condition thereof, and to examine the safes, books, papers and documents belonging to such corporation, or pertaining to its affairs and condition, and to compel the production of all keys, books, papers and documents, by summary process, to be issued on application to any court of record, or any judge thereof, under such rules and regulations as the said court may prescribe.

SEC. 30. The legislature may, at any time, amend or repeal this act, and dissolve all corporations created under it; but such amendment or repeal shall not, nor shall the dissolution of any such corporation, take away or impair any remedy given against any such corporation, its stockholders or officers, for any liability which shall have been previously incurred.

SEC. 31. Any corporation wishing to dissolve and disincorporate itself, shall present a petition to the county judge of the county in which the meetings of the stockholders are usually held, accompanied by a certificate, signed by its proper officers, and setting forth that, at a general or special meeting of the stockholders, called for that purpose, it was decided, by a vote of two-thirds of the stockholders, to disincorporate and dissolve the incorporation. The clerk shall enter such petition and certificate of record, and the judge shall, after thirty days' notice by publication in some newspaper published in the county, and if there are none such, then by advertisements, posted up in the principal public places in the county, proceed to consider the same; and, if the judge shall be of opinion that such incorporation has taken the necessary preliminary steps, and obtained the necessary vote to dissolve itself, and that all claims against the incorporation are discharged, he shall declare such incorporation dissolved.

SEC. 32. Each stockholder of any corporation shall be individually and personally liable for a portion of all its debts and liabilities, proportioned to the amount of stock owned by him.

CORPORATIONS FOR MANUFACTURING, MINING, COMMERCIAL AND OTHER PURPOSES.<sup>1</sup>

Corporations for manufacturing, mining, mechanical, wharfing and dockage, chemical, or agricultural purposes, or for the purpose of engaging in any species of trade or commerce, foreign or domestic, may be formed according to the provisions of this act; such corporations and members thereof being subject to all the conditions and liabilities herein imposed, and to none others: *Provided*, that nothing in this section shall be so construed as to authorize a company formed under it, to own or hold possession of more than fourteen hundred and forty acres of land, or to authorize an individual member of such company or association, in his corporate capacity, to hold, own, or possess a number of acres to exceed eighty; *and provided, further*, that no corporations formed under the provisions of the act of April fourteenth, one thousand eight hundred and fifty-three, except those formed for agricultural purposes, shall own or hold possession of more real estate than shall be actually necessary for the prosecution of the business for which it was incorporated; *and provided, further*, that no corporations, formed for agricultural purposes shall be allowed to hold any mineral lands under the provisions of this act.<sup>2</sup>

Any three or more persons who may desire to form a company for any one or more of the purposes specified in the preceding section, may make, sign, and acknowledge before some officer competent to take the acknowledgment of deeds, and file, in the office of the county clerk of the county in which the principal place of business of the company is intended to be located, and a certified copy thereof under the hand of the clerk and seal of the county court of said county, in the office of the secretary of state, a certificate in writing, in which shall be stated the corporate name of the company, the objects for which the company shall be formed, the amount of its capital stock, the time of its existence, not to exceed fifty years, the number of shares of which the stock shall consist, the number of trustees and their names, who shall manage the concerns of the company for the

<sup>1</sup> Wood's Dig. p. 119; Amended Laws, 1858 and 1859.

<sup>2</sup> Laws 1858, p. 188.

first three months, and the names of the city, or town and county, in which the principal place of business of the company is to be located.

This section stands as amended by the act of 1859, which also provides that corporations heretofore formed by filing a *certified copy* in the office of secretary of state, are valid.<sup>1</sup>

A copy of any certificate of incorporation, filed in pursuance of this act, and certified by the county clerk of the county in which it is filed, or by his deputy, or by the secretary of state, shall be received in all the courts and places as presumptive evidence of the facts therein stated.<sup>2</sup>

When the certificate shall have been filed, the persons who shall have signed and acknowledged the same, and their successors, shall be a body politic and corporate, in fact and in name, by the name stated in the certificate, and by their corporate name have succession for the period limited.<sup>3</sup>

The total amount of the debts of the corporation shall not at any time exceed the amount of the capital stock actually paid in; and in case of any excess, the trustees, under whose administration the same may have happened, except those who may have caused their dissent therefrom to be entered at large on the minutes of the board of trustees at the time, and except those not present when the same did happen, shall, in their individual and private capacities, be liable jointly and severally, to the said corporation, and in the event of its dissolution, to any of the creditors thereof, for the full amount of such excess.<sup>4</sup>

No corporation organized under this act, shall, by any implication or construction, be deemed to possess the power of issuing bills, notes, or other evidences of debt for circulation as money.<sup>5</sup>

Each stockholder shall be individually and personally liable for his proportion of all the debts and liabilities of the company, contracted or incurred during the time that he was a stockholder. For the recovery of which, joint or several actions may be instituted and prosecuted.<sup>6</sup>

No person holding stock as executor, administrator, guardian, or trustee, or holding it as collateral security, or in pledge, shall be personally subject to any liability as a stockholder of the

<sup>1</sup> Laws 1859, p. 98.

<sup>2</sup> id. 498-499.

<sup>3</sup> Wood's Dig. art. 482, 483.

company; but the person pledging the stock shall be considered as holding the same, and shall be liable as a stockholder accordingly; and the estate and funds in the hands of the executor, administrator, guardian, or trustee, shall be liable in like manner and to the same extent as the testator or intestate, or the ward or person interested in the trust fund would have been, if he had been living and competent to act and hold the stock in his own name.<sup>1</sup>

Corporations formed under this act [act of 1853] and the members thereof, shall not be subject to the conditions and liabilities contained in an act entitled "An Act concerning Corporations," passed April twenty-second, one thousand eight hundred and fifty,<sup>2</sup> [quoted above, at the beginning of STATUTORY PROVISIONS.]

See further statutory provisions, collected in *Wood's Digest*, pages 119 to 124.

It shall be lawful for all churches, congregations, religious, moral, beneficial, literary or scientific associations or societies, by such rules or methods as their rules, regulations or discipline may direct, to appoint or elect any number, not less than three nor more than fifteen, as trustees or directors, to take charge of the estate and property belonging thereto, and to transact all affairs relative to the temporalities thereof.<sup>3</sup>

Upon the appointment or election of such trustees or directors, a certificate of such appointment or election shall be executed by the person or persons making the appointment, or the judges holding the election, stating the names of the trustees or directors. The name by which the said trustees shall thereafter forever be called and known shall be particularly mentioned and specified.<sup>4</sup>

Such certificate shall be acknowledged by the persons making the same, or proved by a subscribing witness thereto, before some officer authorized to take acknowledgment of deeds, and recorded, together with the certificate of such acknowledgment or proof, by the clerk of the county within which such church, congregation, religious, moral, beneficial, literary, or scientific society or association shall be situated.<sup>5</sup>

<sup>1</sup> Wood's Dig. art. 408-409.

<sup>2</sup> Id. 75-78.

<sup>3</sup> Id. 506.

Such trustees or directors may have a common seal, and may alter the same at pleasure; they may take into their possession and custody all the temporalities of such corporation, whether the same shall consist of real or personal estate, and whether given, granted or devised, directly or indirectly, to such society or association, or to any person or persons for their use; they may sue and be sued; may recover and hold all the debts, demands, rights and privileges, all churches, burying-places, halls, school-houses, hospitals or other buildings, all the estates and appurtenances, belonging to such association or society; they may have, lease and improve the same, erect all houses or buildings that are necessary to carry out the objects of the society or association, and perform all duties imposed on them by the regulations, rules or discipline of such organization.<sup>1</sup>

It shall be lawful for the district court within and for the county in which any such corporation shall have been constituted, on the application of such corporation, and on its satisfactorily appearing to said court by competent proof, by affidavit or otherwise, that due notice, by personal service or by publication in some newspaper as the said court or judge thereof shall direct, has been given to all persons interested in the matter, and that it will be to the benefit, interest and advantage of such church, congregation, religious, moral, beneficial, literary or scientific association or society, to make an order for the sale or mortgage of any real estate belonging to such corporation, or for the confirmation of any contract under which a valid lien may attach to said property; and it shall be lawful for any member of such church, congregation, association or society, to oppose, by affidavit or otherwise, the granting of such order; and it shall be lawful for said court at the time of making such order directing the execution of a mortgage, also to make a further order allowing such corporation to make and deliver with such mortgage, a bond or promissory note, under the corporate seal and in the corporate name of such corporation, as evidence of the indebtedness to secure which such mortgage is directed to be made; and it shall be the duty of said court, when granting such order or orders, to direct therein the application of the moneys arising

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<sup>1</sup> Wood's Dig. art. 75-79.

from such sale or procured under such contract or upon such security as it shall be made to appear to said court would be for the interest and advantage of such church, congregation or association or society.<sup>1</sup>

Every corporation of the character aforesaid, heretofore incorporated, in pursuance of law, and not since dissolved, shall be and is hereby established and confirmed; and in case of the dissolution of any such corporation, or any corporation hereafter to be formed in pursuance of the provisions of this chapter, for any cause whatever, the same may be incorporated under the provisions of this chapter, at any time within six years after such dissolution, and thereupon all the estate, real and personal, formerly belonging to the same, and not lawfully disposed of, shall vest in such corporation, as if there had been no such dissolution.<sup>2</sup>

All lands, tenements and hereditaments, that have been or may hereafter be lawfully conveyed by devise, gift, grant, purchase or otherwise, to any persons, as trustees in trust for the use of any such organization, shall descend, with the improvements, in perpetual succession to, and shall be held by such trustees, in trust for such organizations, provided the amount of real estate held by such society shall never exceed the amount named in the following section.<sup>3</sup>

The real estate held by the trustees in trust for such organization, shall in no case exceed four whole lots in a town or city, or twenty acres in the country; nor shall the annual income of such real and personal property, held in trust by them, exceed the sum of twenty thousand dollars; *provided*, that the grand lodge of the ancient order of free and accepted masons in this state, or any subordinate lodge thereof, may acquire and hold such property, real and personal, as may be deemed necessary by the proper authorities thereof, to carry out the charitable purposes of said grand lodge, or subordinate lodges, or for the establishment and endowment of a college, school or schools in said state, and for the necessary use and ceremonies of said order, and may sue and be sued, and shall have such other general powers as are granted to corporations under an act entitled "An Act concerning Cor-

<sup>1</sup> Laws 1850, p. 87.

<sup>2</sup> Wood's Dig. art. 80-86.

porations," passed April twenty-second, one thousand eight hundred and fifty.<sup>1</sup>

It shall be the duty of said trustees annually to make a full report of all property, real and personal, held in trust by them, and the condition of the corporation, to the society or association by which they have been appointed or elected, a copy of which report shall be filed in the county clerk's office, where the original certificate is filed, with an affidavit of the truth of such report, and also that such association or corporation has not been engaged, directly or indirectly, in any other business than such as is set forth in the original certificate on file.

Whenever the rules, regulations and discipline of any religious denomination, society or church require, for the administration of the temporalities thereof, and the management of the estate and property thereof, it shall be lawful for the bishop, chief priest, or presiding elder of such religious denomination, society or church to become a sole corporation, in the manner prescribed in this chapter, as nearly as may be, and with all the powers and duties, and for the uses and purposes in this chapter provided for religious incorporations, and subject to all the conditions, limitations and provisions in said chapter prescribed; *provided*, that, for proof of the appointment or election of such bishop, chief priest or presiding elder, it shall be sufficient to record with the clerk of the county in which such bishop, chief priest or presiding elder resides, the original, or a copy of his commission, or certificate, or letters of election or appointment, duly attested; and that all property held by such bishop, chief priest or presiding elder, shall be in trust for the use, purpose and behoof of his religious denomination, society or church; and that the limitation, in section one hundred and eighty-two, shall not apply to incorporations formed under this section; *and provided, also*, that the district judge of the district in which any incorporation is formed under this chapter, shall, at all times, have access to the books of such incorporation.<sup>1</sup>

Any nine or more persons who may desire to act in concert for the care, protection, relief or improvement of, 1. orphans; or, 2. foundlings; or, 3. shipwrecked or destitute sailors; or, 4. sick

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<sup>1</sup> Wood's Dig. art 80-86.

and disabled, or unprotected and needy persons; or, 5. for the establishment and management of cemeteries; and who shall desire to form an incorporated society for the promotion of either of the said benevolent objects, may do so by complying with the provisions of chapter eight of the act concerning incorporations, passed April twenty-second, one thousand eight hundred and fifty; and such benevolent societies, incorporated under the provisions of said act, as hereby extended, shall possess the same powers, be subject to the like liabilities, and enjoy the like privileges as therein provided; *provided*, that any corporation established for purposes of forming or conducting of cemeteries, shall be competent to take and hold any quantity of land not exceeding three hundred and twenty acres.<sup>1</sup>

The corporations hereinbefore enumerated shall have power to elect such officers, and such number of directors, managers or trustees, and fill vacancies, and make such needful rules and regulations to carry their benevolent objects into effect as they may, by their constitution and by-laws, from time to time provide, and as shall not be inconsistent with any of the laws of the land.<sup>1</sup>

#### ORPHAN AND RELIEF SOCIETIES.

ACTS OF MARCH 12 AND APRIL 24, 1858.<sup>2</sup>

SECTION 1. Any nine or more persons who may desire to act in concert for the care, protection, relief or improvement of—first, orphans; or, second, foundlings; or, third, shipwrecked or destitute sailors; or, fourth, sick and disabled, or unprotected or needy persons; or, for literary or educational purposes—and who shall desire to form an incorporated company, or society, for the protection of either of said benevolent or educational objects, may do so by complying with the provisions of chapter eight of the act concerning corporations, passed April twenty-second, A. D. one thousand eight hundred and fifty, and such benevolent and educational society, incorporated under the provisions of said act, as hereby extended, shall possess the same

<sup>1</sup> Wood's Dig art. 80-86.

<sup>2</sup> Laws 1858, p. 57 and 264.



powers, be subject to the like liabilities, and enjoy the like privileges as therein provided.

SEC. 2. Women, married or unmarried, may be incorporators, officers and members, of benevolent, literary or educational corporations, for the purposes herein aforesaid, and may transact the business thereof in the same manner and subject to the same liabilities as males. But no married woman shall have power to contract or incur any liability therein against her husband, nor shall any husband be liable, in any manner, for any debt or liability in any manner contracted or incurred, nor shall the common property of the husband and wife be in any manner affected by his wife becoming or acting as such corporator, except the same be specifically agreed to by the husband and wife, in writing.

SEC. 3. Any corporations formed under the provisions of this act shall have the right to acquire, by purchase or otherwise, and to hold, any quantity of land, not exceeding five hundred acres, with the improvements thereon; or, if within the limits of any incorporated town, then not to exceed twenty acres, with the improvements thereon.

SEC. 4. The corporations hereinbefore enumerated shall have power to elect such officers and such number of directors managers or trustees, and fill vacancies, and make such needful rules and regulations to carry their benevolent objects into effect, as they may, by their constitution and by-laws from time to time provide, and as shall not be inconsistent with any of the laws of this state.

#### RAILROAD COMPANIES.

Any number of persons, not less than twenty-five, either in this state or through any portion of the territories of the United States contiguous to this state, may be formed into a corporation for the purpose of constructing, owning and maintaining such railroad, of either single or double track, by complying with the following requirements: When an instrument, setting forth the road intended to be built, and the name of a person to act as treasurer until articles of association have been adopted, and until a treasurer has been duly elected, has been signed by not less than twenty-five persons as aforesaid, and when stock to the

amount of at least one thousand dollars for every mile of the road so intended to be built, shall be in good faith subscribed, and ten per cent. paid thereon to the treasurer named in said instrument; then (the said treasurer having given notice in writing to all such subscribers, of a meeting to be held not less than twenty days after the date of such notice) the said subscribers, either in person or by written proxy, may adopt articles of association, and may elect from among the subscribers to said articles, thirteen directors for said company.<sup>1</sup>

The said articles of association shall set forth the name of the corporation, the number of years the same is to continue (which shall not exceed fifty years), the amount of the capital stock of the company (which shall be divided into shares of one hundred dollars each, and which shall be the actual cost of constructing the road, together with the cost of the right of way, motive power, and every other appurtenance for the completion and running of said road, as nearly as can be estimated by competent engineers), the names of the directors to manage the concerns of the company, subject to the restrictions hereinafter specified, who shall hold their offices until others are elected, the place from and to which the proposed road is to be constructed, and each county into and through which it is intended to pass, and its length as near as may be, and the names of five commissioners to open books of subscription to the stock, which commissioners shall be subscribers to said articles of association.<sup>1</sup>

Each subscriber to said articles of association shall personally subscribe thereto his name, place of residence, and number of shares of stock taken by him in such company, and the said articles being so subscribed by not less than twenty-five persons, may, after the provisions of section four are complied with, be filed in the office of secretary of state, and thereupon the persons who have so subscribed, and all persons who shall from time to time become stockholders in such company, shall be a body corporate, by the name specified in such articles, and shall be capable in law to make all contracts, acquire real and personal property, and possess all the powers and privileges for the pur-

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<sup>1</sup> Wood's Dig. art. 2966-2970.

pose of carrying on the business of the corporation that private individuals and natural persons now enjoy; and all deeds and conveyances made by such company shall be signed by the president, under the seal of the corporation.<sup>1</sup>

When the amount of stock specified in the first section of this act shall have been subscribed, and ten per cent. on said amount shall have been actually and in good faith paid in cash, to the treasurer appointed by the directors named in such articles, and when there shall be endorsed on said articles, or annexed thereto, an affidavit made by at least three of the said directors that said amount of stock has been subscribed, and that said ten per cent. has been actually paid in as aforesaid, and that the subscribers to said articles are all known by one or the other of the said three directors to be subscribers thereto, and to be the persons so represented, then the said articles of association may be filed in the office of the secretary of state.<sup>1</sup>

The directors named in the articles of association shall organize as a board immediately after their election, notice in writing of the time and place of such meeting having first been given by the treasurer to each director, and at such meeting they shall appoint a president from among the directors, and a secretary and a treasurer, who shall be officers of the company as well as of the board of directors, and hold their respective offices until their successors have been duly qualified. The secretary and the treasurer, before they enter upon the performance of their duties, shall each give a bond, with sufficient surety for the faithful performance of their respective duties, which bond and surety shall be approved and accepted by the board of directors. The temporary treasurer required by the first section, shall pay over all moneys received by him as such treasurer, to the treasurer appointed by the board of directors, as soon as the latter has been qualified. The board of directors shall name, and give notice thereof to all the commissioners, in two or more newspapers of this state, in which notices of the time and place of all the meetings of the company shall be published prior to any such meeting, until after the directors provided for in section eleven shall have been elected; *provided*, in selecting such newspapers, those

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<sup>1</sup> Wood's Dig. art. 2966-2970.

published in the counties into or through which the contemplated railroad may run, shall be preferred.<sup>1</sup>

Should the entire capital stock not be subscribed within one year from the date of the articles of association, a new board of directors shall be elected by the stockholders at the first regular meeting thereafter of the company, notice of such intended election having been given as hereinafter provided in section eleven; and the directors so elected shall have the same powers and the same duties as their predecessors in office.<sup>1</sup>

A copy of any articles of association filed in pursuance of this act, with a copy of the affidavit aforesaid endorsed thereon or annexed thereto, and certified to be a copy by the secretary of state, shall, in all courts and places, be presumptive evidence of the incorporation of such company, and of the facts therein stated, and such a copy, so certified, shall be kept in the office of the secretary of the corporation, subject to examination, during office hours, by any person.<sup>1</sup>

Said articles of association may, at any time before the capital stock is fully subscribed for, be altered, modified or changed, by filing with the secretary of state new articles of association subscribed by two-thirds in numbers and also in amount of the stockholders and stock in such company, at the time the said new articles are adopted; *provided*, there is endorsed upon the said new articles, or attached thereto, an affidavit made by the secretary of the company that he is the acting secretary of such company, and that the names of two-thirds in numbers and amount of stockholders and stock, at the date of said affidavit, are subscribed to said new articles by such stockholders, which said affidavit shall be made before the county clerk of the county in which the office of the secretary of the company may be located. As soon as such new articles, with such an affidavit endorsed thereon, or attached thereto, have been filed as aforesaid, the corporation shall be conducted under the new articles, in the same manner as though the original articles had contained all the provisions of the new articles; and from and after the date of the filing of said new articles as aforesaid, the original articles shall be null and void. But the duration of the corporation shall

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<sup>1</sup> Wood's Dig. art. 2966-2970

not be extended by any new articles beyond fifty years after the date of the original articles; and the new articles shall not so change the character of the company as to make it other than a company incorporated for railroad purposes, according to the provisions of this act; *provided*, should any portion of the stockholders object to the filing of new articles as aforesaid, the company shall be liable for, and pay to each of the stockholders objecting, who may demand it, the several assessments they may have previously paid upon their several shares, and such shares, from and after the repayment of the assessments by the company, shall belong to the company.<sup>1</sup>

The provisions of this act shall extend and be applied to companies incorporated for the purpose of constructing roads on which to run prairie cars, so far as the same can be made applicable. The stockholders in car-road companies shall not be less than eight, and the directors not less than three in number.<sup>2</sup>

It is hereby declared lawful for railroad companies or railroad corporations hereafter to be formed, by any number of persons not less than ten, and for the affairs thereof, to be managed by any number of directors not less than five nor more than thirteen; *provided, always*, that such corporations or companies shall in all other respects conform to, and abide by, the provisions of the several acts now in force, relating to railroad corporations or companies.<sup>3</sup>

The statutory provisions affecting railroads are found collected in full in *Wood's Digest of Laws*, pages 591 to 605, except certain amendments found in laws of 1858, pages 317 to 326.

#### PLANK-ROAD COMPANIES.

The following sections of the act do not apply to the counties of Plumas, Sierra, Trinity, Siskiyou, Del Norte, Klamath, Butte and Shasta.

Nine or more persons may organize a joint-stock company for the construction of a plank-road, a turnpike road, or a plank and turnpike road, in this state, in the following manner:<sup>4</sup>

<sup>1</sup> Wood's Dig. art. 2906-2970.

<sup>2</sup> Id. 2986.

<sup>3</sup> Id. 2988.

<sup>4</sup> Id. 3149-3152.

They shall make and subscribe their declaration of intention to organize such company, and shall designate therein what kind of road, the general route, and the termini, as nearly as practicable, and shall also designate therein a time not less than ten days after publication, and a place in one of the counties intended to be traversed by such road, for a meeting of the subscribers of the notice, for the purpose of a preliminary organization of such company, as hereinafter provided.

Said notice shall be published one week or more in one or more newspapers in each of the counties intended to be traversed by such road, and if there be no newspaper published therein, then said notice shall be posted for the same period in five public places in said counties.

At the time and place specified for the meeting of the subscribers, they shall proceed to the election from their number, of a president, secretary and treasurer, and designate the corporate name, and shall file a certificate of the same, together with their declaration of intention, as provided in section nine of this act, from which time they and their successors and all officers and stockholders, shall be and remain a body corporate. The officers shall hold their offices until the final organization of the company and the election of their successors, as is hereafter provided.<sup>1</sup>

The company, after the preliminary organization, shall, as soon as practicable, cause a survey to be made of the proposed route, and shall determine the amount of capital stock required for the construction of the road, and also fix the number and valuation of shares, and to determine the period of its existence, which shall not exceed twenty years. They shall also open the books for subscriptions to stock in such company, at such time and place and in such manner as they shall designate by vote.<sup>1</sup>

Until the final organization of the company, as hereinafter provided, the members thereof shall be jointly and severally liable for all debts contracted prior to such final organization.<sup>1</sup>

As soon as the amount of the capital stock designated shall be subscribed, reasonable notice shall be given by the company to all resident stockholders of the state, in such manner as the com-

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<sup>1</sup> Wood's Dig. art. 3143-3152.

pany may direct, that a meeting of the stockholders will be held at a specified time and place, for the purpose of electing a president, secretary and treasurer, and a board of not less than five directors and officers, to fill such other offices as may be established, and of enacting by-laws for the company; and thereupon, at such specified time and place, the stockholders shall proceed to elect said officers, and perform such other acts as may be necessary for the better organization of the company. The officers specified in this section shall hold their offices one year and until their successors be elected, and thereafter such offices shall be annually elected. They shall be stockholders and residents of the state, except absent on business of the company, and shall be elected at such time and place, and upon such notice, and in such mode, as shall be decided by the by-laws of the company. But all elections shall be by ballot, and each stockholder, either in person or by proxy, shall be entitled to as many votes as he owns shares of stock. In such elections, a plurality of votes shall elect. Vacancies shall be filled in such manner as may be provided for in the by-laws. The president and secretary of the company shall be *ex officio* members of the board of directors, and the president and secretary thereof. Whenever any stock is held by any person as executor, administrator, guardian, or trustee, he shall represent such stock at all meetings of the company, and may vote accordingly as a stockholder. Any stockholder may pledge his stock by a delivery of the certificates or other evidence of his interest, but may nevertheless represent the same at all meetings, and vote accordingly as a stockholder.<sup>1</sup>

If it should happen at any time that an election shall not be made on the day designated by the by-laws of the company, the corporation shall not for that reason be dissolved; but it shall be lawful on any other day to hold an election in such manner as shall be provided for by the by-laws of the company; and all acts of directors and officers, shall be valid and binding upon the company until their successors shall be elected. A majority of the whole number of directors shall form a board for the transaction of business, and every decision of a majority of the persons duly assembled as a board, shall be valid as a corporate act.<sup>1</sup>

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<sup>1</sup> Wood's Dig. art. 3142-3152.

The meeting of the directors shall be called by a notice, signed by the president or two directors, setting forth the time and place of the meeting, which notice shall be either delivered, personally to each director, or published at least ten days in some newspaper of the county in which is the principal place of business of the corporation, or if no newspaper be published in the county, then in some newspaper nearest thereto.<sup>1</sup>

Unless the preliminary organization provided for in section four of this act, be made within one month after the publication of the original notice of declaration of intention, and unless the whole amount of capital stock designated shall be subscribed, and the final organization provided in section seven be made, within six months after such preliminary organization, and an amount equal to ten per cent. or more of the capital stock be paid in, and the survey filed within one month after such final organization, then the company shall be deemed to have abandoned its intention and shall be dissolved by operation of law.<sup>1</sup>

As soon as the preliminary organization shall have been made, the company shall file in the office of the county recorder in each county traversed by such road, a copy of the original notice of declaration of intention, and a certificate of the election of officers and of the corporate name; and as soon as the final organization of said company shall have been made, and an amount equal to ten per cent. of the capital stock has been paid in, a certificate of the same, setting forth the whole amount of stock and the percentage therein paid, shall be filed as above provided in this section, and as soon as the survey and the route shall have been adopted, the same shall be filed in each county traversed by the road. Immediately after the filing of the notice, certificates and surveys, the recorder of the county first in alphabetical order, shall certify to the secretary of state the fact of the complete organization of the company, as appearing on record in his office.<sup>1</sup>

Each stockholder shall be individually and personally liable for his proportion of the debts and liabilities of the company contracted or incurred during the time that he was a stockholder; for the recovery of which, joint or several actions may

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<sup>1</sup> Wood's Dig. art. 3143-3152.



be instituted and prosecuted. The liability of each shall be proportioned to the amount of stock owned respectively.<sup>1</sup>

No person holding stock, as executor, administrator, guardian or trustee, or holding it as collateral security, or in pledge, shall be personally subject to any liability as a stockholder of the company, but the person pledging the stock shall be considered as holding the same, and shall be liable as a stockholder accordingly; and the estate and funds in the hands of the executor, administrator, guardian or trustee, shall be liable in like manner and to the same extent, as the testator or intestate, or the ward or person interested in the trust fund would have been, if he had been living and competent to act and hold the stock in his own name.<sup>2</sup>

All the provisions of "An Act to Authorize the Formation of Corporations for the Construction of Plank or Turnpike Roads," passed May twelfth, one thousand eight hundred and fifty-three, wherein the same do not conflict with the provisions of the following sections of this act, shall apply to the corporations of companies formed for the purpose of constructing common wagon roads.<sup>3</sup>

See further statutory provisions, *Wood's Digest*, pages 652 to 658, section 34 of which is repealed.—*Laws*, 1858, p. 145.

#### TELEGRAPH COMPANIES.

Any number of persons may associate for the purpose of constructing a line or lines of wires of telegraph through this state, or from and to any point within this state, upon such terms and conditions, and subject to the liabilities prescribed in this chapter.\*

Such persons, under their hands and seals, shall make a certificate which shall specify: 1. The name assumed to distinguish such association, and to be used in its dealings, and by which it may sue and be sued. 2. The general route of the line or lines of telegraph, designating the points to be connected. 3. The capital stock of such association, and the number of shares into which the stock shall be divided. 4. The names and places of residence of the shareholders, and the number of shares held by

<sup>1</sup> Wood's Dig. art. 8159.

<sup>2</sup> *Id.* 8861-8870.

<sup>3</sup> *Id.* 8167.

each of them respectively. 5. The period at which such association shall commence and terminate; which certificate shall be proved, or acknowledged and recorded in the office of the clerk of the county where any office of such association shall be established, and a copy thereof filed in the office of the secretary of state. Such acknowledgment may be taken by any officer authorized to take the acknowledgment of deeds of real estate, at the place where such acknowledgment is taken.<sup>1</sup>

Upon complying with the provisions of the last preceding section, such association shall be, and is hereby declared to be, a body corporate by the name so as aforesaid to be designated in said certificate; and a copy of said certificate, duly certified by the clerk of the county where the same is filed and recorded, or by the secretary of state, may be used in all courts and places for and against such association.<sup>1</sup>

Such association shall have power to purchase, receive and hold and convey such real estate, and such only, as may be necessary for the convenient transaction of the business, and for effectually carrying on the operations of such associations; and may appoint such directors, officers and agents, and make such prudential rules, regulations and by-laws, as may be necessary in the transaction of their business, not inconsistent with the laws of this state or of the United States.<sup>1</sup>

Such association is authorized to construct lines of telegraph along and upon any road or highway, or across any of the waters or any lands within the limits of this state, by the appropriation of any trees growing by nature, or by the erection of the necessary fixtures, including posts, piers or abutments, for sustaining the wires of said lines; *provided*, the same shall not be so constructed as to incommode the public use of said road or highway, or injuriously interrupt the navigation of said waters; nor shall this chapter be so construed as to authorize the construction of any bridge across any of the navigable waters of this state.<sup>1</sup>

If any person over whose lands said lines shall pass, upon which posts, piers or abutments shall be placed, or standing trees appropriated, shall consider himself aggrieved or damaged thereby, it shall be the duty of the county court of the county

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<sup>1</sup> Wood's Dig. art. 8361-8370.

within which such lands are, on the application of such person, and on notice of such application being served on the president or any director of such association, to appoint three discreet and disinterested persons as commissioners, who shall severally take an oath before any person authorized to administer oaths, faithfully and impartially to perform the duties required of them by this chapter; and it shall be the duty of said commissioners, or a majority of them, to make a just and equitable appraisal of all the loss or damage sustained by said applicant, by reason of said lines, posts, piers or abutments, or appropriation of standing trees, duplicates of which said appraisement shall be reduced to writing and signed by said commissioners, or a majority of them; one copy shall be delivered to the applicant, and the other to the president or any director or officer of said association or corporation, on demand; and in case any damage shall be adjudged to said applicant, the association or corporation shall pay the amount thereof, with the costs of said appraisal, said costs to be set forth and liquidated with the damage appraised, and said commissioners shall receive for their services such compensation as the county judge may award, to be paid in like manner as the costs and damages appraised. But in no case shall the person feeling himself injured or aggrieved be entitled to any damage, when application is not made to the county court within three months after the erection of said telegraph lines across the lands of such person.<sup>1</sup>

Any person who shall unlawfully and intentionally injure, molest or destroy any of said lines, posts, piers or abutments, or the materials, or property belonging thereto, shall, on conviction thereof, be deemed guilty of a misdemeanor, and be punished by a fine not exceeding five hundred dollars, or imprisonment in the county jail, not exceeding one year, or both, at the discretion of the court before which the conviction shall be had.<sup>1</sup>

It shall be lawful for any association of persons organized under this chapter, by their articles of association, to provide for an increase of their capital, and the number of the association.<sup>1</sup>

It shall be the duty of the owner, or the association owning any telegraph line doing business within this state, to receive dis-

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<sup>1</sup> Wood's Dig. art. 8861-8870.

patches from and for other telegraph lines and associations, and from and for any individual; and, on payment of their usual charges for individuals for transmitting dispatches, as established by the rules and regulations of such telegraph lines, to transmit the same with impartiality and good faith, and shall not disclose any communication transmitted on said line or lines, directed to a third person, in the penalty of five hundred dollars for every neglect or refusal so to do, or confidential disclosure, to be recovered with costs of suit in the name and for the benefit of the person or persons sending or desiring to send such dispatch.

It shall likewise be the duty of every such owner or association to transmit all dispatches in the order in which they are received, under the penalty of one hundred dollars, to be recovered with costs of suit, by the person or persons whose dispatch is postponed out of its order, as herein prescribed; *provided, however*, that an arrangement may be made with the proprietors or publishers of newspapers for the transmission, for the purpose of publication, of intelligence of general and public interest out of its regular order.<sup>1</sup>

Any person or persons who shall wilfully or maliciously break, injure or destroy a subaqueous telegraph cable, crossing any of the waters of this state, shall, upon conviction thereof, be fined in any sum not less than five hundred dollars, nor more than ten thousand dollars, to which may be added imprisonment in the state prison for any term not less than one year nor more than five, at the discretion of the court. Such persons, so offending, or any person who shall break, injure or destroy, through neglect or want of proper care, said subaqueous cable, shall also be held liable for full damages arising from the injury or destruction of the same; and any ship, steamer or other vessel, which, by dragging its anchor or otherwise, shall in any manner damage or destroy said subaqueous cable, upon proof that proper care and discretion were not used by the master of said vessel, or person commanding or having charge of such vessel, at the time the said injury or destruction took place, shall be held responsible for all damages, and the person commanding or having the said vessel in charge, at the time said injuries to said cable were sustained,

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<sup>1</sup> Wood's Dig. art. 3361-3370.

shall be subject to the fine and imprisonment hereinbefore provided.<sup>1</sup>

Before any association formed for telegraph purposes shall be entitled to the benefits of section second of this act, they shall cause to be erected at the commencement and termination of said subaqueous cable, on the shores of the water such cable underlies, suitable monuments, one on each shore, indicating the place of said cable, and shall also cause to be published, in a public newspaper having a fair circulation, on and about the waters crossed by said cable, a public notice setting forth a description of said monuments, together with the termination and course of said cable. Such notice shall be published at least one month, and it is herein provided, that no association for telegraph purposes shall be entitled to the benefits of section second of this act, unless said subaqueous cable be not less than two miles from the centre of shipping, in the port of San Francisco.<sup>2</sup>

#### STEAM NAVIGATION COMPANIES.

One or more persons, being subscribers to the stock of any contemplated company for the purpose of navigating the ocean, any bay, river or stream within this state, with vessels propelled in whole or in part by steam, may be formed into a corporation for that purpose by complying with the following requirements: When stock to the amount of one-fourth part of the whole capital stock of such company shall have been in good faith subscribed for, and ten per cent. thereof actually paid in, they may make, sign and acknowledge, before some officer competent to take the acknowledgment of deeds in this state, a certificate in writing, and file the same in the office of the secretary of state, and a duplicate thereof with the county clerk of each county wherein may be situated the port or ports hereafter in this section mentioned, in which shall be stated the corporate name of said company, and the objects for which the company shall be formed; the amount of the capital stock of the said company; the amount subscribed for, and the amount actually paid in; the term of its existence, not to exceed fifteen years; the number of

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<sup>1</sup> Wood's Dig art. 3361-3370.

shares of which the said stock shall consist; the number of directors or trustees and their names, who shall manage the concerns of the company for the first year, and the name of the port or ports in this state where the principal business of said company is to be transacted.<sup>1</sup>

When the certificate shall have been filed as aforesaid, the persons who shall have signed and acknowledged the same, and their successors, shall be a body politic and corporate in fact and in name, by the name stated in such certificate; and by that name have succession, and be capable of suing and being sued in any court of law or equity in this state; and they or their successors may have a common seal, and make and alter the same at pleasure; and they shall, by their corporate name, be capable in law, of purchasing, holding or conveying any real or personal estate whatever, which may be necessary to enable the said company to carry on the operations named in such certificate.<sup>1</sup>

The stock, property and concerns of such company shall be managed by any number not exceeding fifteen directors, or trustees, who shall respectively be stockholders in such company, and a majority of whom shall be residents of this state, and who shall, except the first year, be annually elected by the stockholders at such time and place as shall be directed by the by-laws of the company; and a public notice of the time and place of holding such election, shall be published not less than twenty days previous thereto; and the election shall be made by such stockholders as shall attend for that purpose, either in person or by proxy. All elections shall be by ballot, and each stockholder shall be entitled to as many votes as he owns shares of stock in said company; and the persons receiving the greatest number of votes shall be directors or trustees as aforesaid; and when any vacancy shall happen among the directors or trustees by death, resignation or otherwise, it shall be filled for the remainder of the year in such manner as shall be provided for by the by-laws of said company.<sup>1</sup>

In case it shall happen at any time that an election of directors or trustees shall not be made on the day designated by the

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<sup>1</sup> Wood's Dig. art. 2294-2305.

by-laws of said company, when it ought to have been made, the company for that reason shall not be dissolved, but it shall be lawful on any other day to hold an election for directors or trustees in such manner as shall be provided for by the said by-laws, and all acts of directors or trustees shall be valid and binding as against such company, until their successors shall be elected.<sup>1</sup>

There shall be a president of the company who shall be designated from the number of directors or trustees, and also such subordinate officers as the company by its by-laws may designate, who may be elected or appointed, and required to give such security for the faithful performance of the duties of their office, as the company by its by-laws may require.<sup>1</sup>

It shall be lawful for the directors or trustees to call in, and demand from the stockholders respectively all such sums of money by them subscribed, at such time, or in such payments or instalments as to them shall seem proper, under the penalty of forfeiting the shares of stock subscribed for, and all previous payments made thereon, if payment shall not be made by the stockholders within forty-five days after a personal demand or notice requiring such payment shall have been made or published for two successive weeks in any newspaper where the business of the company shall be carried on as aforesaid.

The stock of such company shall be deemed personal estate, and shall be transferable in such manner as shall be prescribed by the by-laws of the company.<sup>1</sup>

The directors or trustees of such company shall have power to make such prudential by-laws as they shall deem proper for the management and disposition of the stock and business affairs of such company, not inconsistent with the laws of this state, and prescribing the duties of officers, engineers, agents and servants that may be employed, for the appointment of all officers, and for the carrying on of the business aforesaid.<sup>1</sup>

A copy of the certificate of incorporation, filed in pursuance of this chapter, certified by the county clerk or his deputy, to be a true copy of the whole of such certificate, shall be received in all courts and places, as presumptive legal evidence of the incor-

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<sup>1</sup> Wood's Dig. art. 8294-8305.

poration of such company, if the same shall comply with the provisions of this chapter.<sup>1</sup>

The capital stock in said certificate, fixed and limited, shall all be paid in, one-half thereof within one year, the other half thereof within two years, from the incorporation of said company, or such corporation shall be dissolved; and certificates of its having been so, as aforesaid, paid, shall be signed and sworn to by the president and a majority of the trustees, before some person authorized to administer oaths, and filed in the office of the clerk or clerks where the original certificate aforesaid shall have been filed, within thirty days after the same shall have been paid as aforesaid.<sup>1</sup>

Each stockholder in any company formed under the provisions of this chapter, shall be personally liable for all debts and liabilities of said company, in proportion to the amount of stock by him held at the time such debts or liabilities shall have been incurred; but no suit shall be brought against any stockholder who shall cease to be a stockholder in any such company, for any such debt or liability, unless the same shall be commenced within one year from the time he shall have ceased to be a stockholder in such company, nor until an execution against the company shall have been returned unsatisfied or in part.<sup>1</sup>

Any corporation formed under the provisions of this chapter may, at any time, by a vote representing two-thirds of all its stockholders, increase or diminish its capital, by filing a new certificate, similar in other respects to the original one, and an affidavit of the president and a majority of the directors or trustees, that the new stock has been paid in within thirty days thereafter, in the office of the clerk of the county where their principal place or places of business are situated, except that the term of office of the existing directors or trustees shall not be thereby shortened or enlarged.<sup>1</sup>

If the directors or trustees of any such company shall declare and pay any dividend, when the company is insolvent, or any dividend, the payment of which would render it insolvent, or which would reduce the amount of the capital stock, all the directors or trustees voting to declare the same, shall be jointly

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<sup>1</sup> Wood's Dig. art. 3224-3226.



and severally liable for all the debts of the company then existing.'

If any certificate, report made, or public notice given, by the officers of any such company, in pursuance of the provisions of this chapter, shall be false in any material representation, any and all such officers who shall have signed the same, knowing it to be false, shall be deemed guilty of a misdemeanor, and shall be dismissed from office; and, on conviction thereof, before any court having jurisdiction, be fined in a sum not exceeding ten thousand dollars, and imprisoned for a term of time not exceeding twelve months, at the discretion of the court.'

#### WATER COMPANIES.

The provisions of chapters one and five of the act entitled "An Act concerning Corporations," passed April twenty-second, one thousand eight hundred and fifty, shall extend to and apply to all associations already formed or hereafter to be formed under said act, for the purpose of supplying any cities or towns in this state, or the inhabitants thereof, with pure and fresh water.'

Any company incorporated for the purposes specified in the preceding section, shall have the right to purchase or take possession of, and use, and hold, such lands and waters as may be required for the purposes of the company, lying without the limits of the city, intended to be supplied with water, upon making compensation therefor. The mode of proceeding to obtain possession of such lands for the use of the company, in cases where the parties cannot agree upon a purchase for the use of the company, shall be the same as prescribed in sections seventeen and eighteen of "An Act to provide for the Incorporation of Railroad Companies," passed April twenty-eighth, one thousand eight hundred and fifty-one.'

This act shall not give to any company a right to supply any city with water, unless it shall be previously authorized by an ordinance, or unless it be done in conformity with a contract entered into between the city and company; any contracts hereafter so made, shall be valid and binding in law, but shall not take

<sup>1</sup> Wood's Dig. art. 8294-8305.

<sup>2</sup> id. 8465-8467.

from the city the right to regulate the rates for water, nor shall any exclusive right be granted by contract, or otherwise, for a term exceeding twenty years.<sup>1</sup>

SUPPLEMENTARY ACT OF 1858.

SECTION 1. The provisions of an act entitled an act to provide for the formation of corporations for certain purposes, passed April fourteenth, one thousand eight hundred and fifty-three, and the provisions of an act entitled an act to amend an act entitled an act to provide for the formation of corporations for certain purposes, passed April fourteenth, one thousand eight hundred and fifty-three, and passed on the thirtieth (30th) day of April, one thousand eight hundred and fifty-five,<sup>2</sup> shall extend and apply to all corporations already formed, or hereafter to be formed, under said acts, for the purpose of supplying any city and county, or any cities or towns in this state, or the inhabitants thereof, with pure fresh water.

SEC. 2. Any company incorporated for the purposes specified in the preceding section, shall have the right to purchase, or to appropriate and take possession of, and use and hold, all such lands and waters as may be required for the purposes of the company, upon making compensation therefor. The mode of proceeding to appropriate and take possession of such lands and waters, when the parties cannot agree upon a purchase thereof, shall be the same as prescribed in sections twenty-seven, twenty-eight and twenty-nine, of an act to provide for the incorporating of railroad companies, passed April twenty-second, one thousand eight hundred and fifty-three, except that such proceedings shall be had before the county judge of the county in which such lands or waters, or both, may be situated; *provided*, that all reservoirs, canals, ditches, pipes, aqueducts, and all conduits heretofore built, or that hereafter may be constructed by any corporation formed under this act, or claiming the privileges, rights, and immunities herein granted, or any of them, shall be used exclusively for the purpose of supplying any city and county, or any

<sup>1</sup> Wood's Dig. art. 3465-3467.

<sup>2</sup> These provisions of the statutes are found above under the head of CORPORATIONS FOR MANUFACTURING, MINING, COMMERCIAL AND OTHER PURPOSES.

cities or towns, in this state, or the inhabitants thereof, with pure fresh water.

SEC. 3. All privileges, immunities, and franchises, that may hereafter be granted to any individual or individuals, or to any corporation or corporations, relating to the introduction of fresh water into the city and county of San Francisco, or into any city or town in this state, for the use of the inhabitants thereof, are hereby granted to all companies incorporated, or that may hereafter become incorporated, for the purposes aforesaid.

SEC. 4. All corporations formed under the provisions of this act, or claiming any of the privileges of the same, shall furnish pure fresh water to the inhabitants of such city and county, or city or town, for family uses, so long as the supply permits, at reasonable rates and without distinction of persons, upon proper demand therefor, and shall furnish water, to the extent of their means, to such city and county, or city or town, in case of fire or other great necessity, free of charge. And the rates to be charged for water shall be determined by a board of commissioners, to be selected as follows: two by such city and county, or city or town authorities, and two by the water company; and in case that four cannot agree to the valuation, then, in that case, the four shall choose a fifth person, and he shall become a member of said board; if the four commissioners cannot agree upon a fifth, then the sheriff of the county shall appoint such fifth person. The decision of a majority of said board shall determine the rates to be charged for water for one year, and until new rates shall be established. The board of supervisors, or the proper city or town authorities, may prescribe such other proper rules relating to the delivery of water, not inconsistent with this act and the laws and constitution of this state.

SEC. 5. Any corporation created under the provisions of this act, shall have the right, subject to the reasonable direction of the board of supervisors or city or town authorities, as to the mode and manner of exercising such right, to use so much of the streets, ways and alleys, in any town, city, or city and county, or any public road therein, as may be necessary for laying pipes for conducting any water into such town, city, or city and county, or through or into any parts thereof.

SEC. 6. Any corporation heretofore formed for the purposes

specified in this act, shall have the right to reincorporate under the provisions of this act, without losing, forfeiting, or diminishing any of the rights, privileges, franchises or immunities which they have heretofore lawfully acquired.

#### INSURANCE COMPANIES.

Any seven or more persons who may desire to form an insurance company, may make, sign and acknowledge, before some officer competent to take acknowledgment of deeds, and file in the office of the clerk of the county in which the business of the company shall be carried on, and a duplicate thereof in the office of the secretary of state, a certificate in writing, in which shall be stated the corporate name of the company, the amount of its capital stock, the term of its existence (not to exceed fifty years), the number of shares of which the stock shall consist, the number of directors and their names who shall manage the concerns of the company for the first year, and the names of the town and county in which the office of the company is to be established.<sup>1</sup>

When the certificate shall have been filed as aforesaid, the persons who shall have signed and acknowledged the same, shall be a body politic and corporate, by the name stated in the certificate.<sup>1</sup>

Every company incorporated under this chapter, may make insurance upon vessels, freight, money, goods and effects, and against captivity of persons, and on the life of any person during his absence at sea, and on money lent upon bottomry and respondentia; and they may also make insurance against fire on any dwelling-house or other buildings, and on merchandise or other property within the United States. Such company shall not, directly or indirectly, deal or trade in buying and selling any goods, wares, merchandise, stocks or commodities whatever.<sup>1</sup>

If any of the said companies shall be under liabilities for losses to an amount equal to their capital stock, and the president or directors, after knowing the same, shall make any new or further insurance, the estates of all who make such insurance, or assent

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<sup>1</sup> Wood's Dig. art. 2662.

<sup>2</sup> Id. 2665.

thereto, shall be severally and jointly liable for the amount of any loss which shall take place under such insurance.<sup>1</sup>

For further provisions of the statutes in regard to insurance companies, see *Wood's Digest*, pages 505 to 507.

#### MUTUAL INSURANCE COMPANIES.

Any seven or more persons who desire to form a mutual insurance company, shall make, sign and acknowledge, before some officer competent to take the acknowledgment of deeds, and file in the office of the clerk of the county in which the business of the company shall be carried on, and a duplicate thereof in the office of the secretary of state, a certificate, in writing, in which shall be stated the corporate name of the company, the proposed amount of the capital stock, the proposed term of its existence, not to exceed twenty years, the proposed number of shares of which its stock shall consist, the number of directors, and their names, who shall manage the concerns of the company for the first year, and the names of the town and county in which the office of the company is to be established.<sup>2</sup>

All the provisions of chapter second of the act entitled "An Act concerning Corporations," passed April twenty-second, one thousand eight hundred and fifty, excepting sections thirty-four, thirty-seven, forty-two, forty-three, fifty-one and fifty-two of said chapter, shall be applicable to mutual insurance companies.<sup>3</sup>

When the certificate shall have been filed as aforesaid, the persons who shall have signed and acknowledged the same, and those who shall thereafter subscribe to the capital stock, or who shall become insurers under such certificate of organization, shall be a body politic and corporate by the name stated in the certificate.<sup>4</sup>

It shall be lawful for the directors to call in and demand from the stockholders respectively, all such sums of money by them subscribed, at such times and in such payments or instalments as the directors shall deem proper, under the penalty of forfeiting the shares of stock subscribed for and all previous payments made thereon, if a personal demand shall have been made at

<sup>1</sup> Wood's Dig. art. 2683.

<sup>2</sup> Id. 2690-2692.

least six weeks previously, or if a notice requiring such payment shall have been published for six successive weeks in some newspaper of the place where the business of said company is carried on, or if no newspaper be published in such place, then in a newspaper published nearest thereto.<sup>1</sup>

Every company incorporated under this act, may make insurance upon vessels, freight, money, goods and effects, and against captivity of persons, and on the life of any person during his or her absence at sea, and on money lent on bottomry and respondentia, and may also make insurance against fire, on any dwelling-house, buildings, merchandise, or other property, situated in the state of California, and may also make insurance upon the life of any person, whether at home or abroad, for a limited term, or during his or her natural life.<sup>1</sup>

No company shall issue policies until the sum of two hundred thousand dollars shall have been subscribed and conditions complied with, as required in section seventh.<sup>2</sup>

No company shall directly or indirectly deal or trade in buying or selling any goods, wares, merchandise, stock, or commodities whatever; but this shall not be construed to prevent such company from selling any goods, wares, merchandise, stock, or commodities which may have been hypothecated or pledged with them as securities, for the loan or investment of money, whenever the same is made in good faith to protect the company from loss upon such loan or investment.<sup>3</sup>

The following section applies to all insurance companies:

No company incorporated under this act shall take on any one risk, whether it be a marine risk, an insurance against fire, or an insurance on the life of any person, a sum exceeding one-tenth part of their capital subscribed.<sup>4</sup>

#### AGRICULTURAL SOCIETIES.

AN ACT CONCERNING AGRICULTURAL SOCIETIES, PASSED MARCH 19, 1859.

SECTION 1. Any seven or more persons may form an association for agricultural purposes, and when so formed shall be known and designated by the name of Agricultural Society,

<sup>1</sup> Wood's Dig. art. 2090-2092.

<sup>2</sup> Id. 2092.

<sup>3</sup> Id. 2094.

and by such name and style shall have perpetual succession, and shall have power and authority to contract and be contracted with; to sue and be sued in all courts; to have and use a common seal, and to alter the same at pleasure; to make, ordain and establish, and put in execution, such by-laws, ordinances, rules and regulations, as shall be necessary for the good government of such society, and the management of its affairs; *provided* that said by-laws, ordinances, rules and regulations, shall not be contrary to any provisions of this charter, or the constitution of this state, or of the United States.

SEC. 2. In addition to the powers above enumerated, the society shall, by its name, have power to purchase, hold, and lease, any quantity of land not exceeding in the aggregate one hundred and sixty acres, with such buildings and improvements as may be erected thereon, and may sell, lease and dispose of the same at pleasure. The said real estate shall be held by such society for the purpose of erecting buildings and other improvements calculated to promote and encourage the interests of agriculture, horticulture, mechanics, manufactures, stock-raising and general domestic industry.

SEC. 3. The officers of such society shall consist of a president, two vice-presidents, a secretary, a treasurer and two directors, all of whom shall be members of such society at the time of their election, and shall have the management of the fiscal, prudential, and other concerns of such society, and shall be styled the board of managers. The said officers shall be elected annually by the members of the society, at such time, and in such manner, as in their constitution and by-laws they may prescribe, and shall hold their offices for the term of one year, and until their successors enter upon their duties.

SEC. 4. Such society may provide, by its constitution and by-laws, for memberships of such society, and fix the prices of such membership, and terms of duration thereof.

SEC. 5. No society organized under the provisions of this act shall contract any debts or liabilities to exceed the amount of money in the treasury at the time such debt or liability shall have been contracted, except as provided in the next section.

SEC. 6. Such society may, by the unanimous vote of the board of managers, for the purpose of purchasing or leasing property,

as provided for by the second section of this act, create debts or liabilities, not to exceed the sum of one thousand dollars, and in case of any excess being incurred, the said board of managers shall, in their individual and private capacities, be held jointly liable to such society for the amount of such excess; *provided* that any member of said board, who shall have been absent, or caused his dissent therefrom, at the time, to be entered on the minutes, shall not be so held liable.

SEC. 7. Within three months after the organization of such society, the board of managers thereof shall cause to be filed in the office of the county clerk of the county in which such society is organized, a certificate stating the name of the society, the purposes for which it was organized, the date of its organization, and the names of its officers, which certificate shall be signed by the president and secretary of said society; a copy of such certificate, filed as aforesaid, and certified by the county clerk, shall be received in all courts and places, as presumptive evidence of the matters therein stated.

SEC. 8. It shall not be lawful for any person to sue such society for the failure to award any premium or premiums, or for a failure to pay the same when awarded.

For remainder of this act, see *Laws* of 1859, page 104.

For Rural Cemetery Associations, see *Laws* 1858, page 281.

## OREGON.

### CONSTITUTIONAL PROVISIONS.<sup>1</sup>

Under the constitution of Oregon, no law can be passed authorizing the establishment of any corporation for banking purposes, or for the issuing or circulation of any kind of paper money. Corporations may be formed under general laws, but cannot be created by special laws, except for municipal purposes.

The stockholders of all corporations and joint-stock companies shall be liable for the indebtedness of said corporation to the amount of their stock subscribed and unpaid, and no more.

Private property cannot be taken by a corporation, until compensation is made or secured.

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<sup>1</sup> Const. of Oregon, art. XI.



The state cannot subscribe to or be interested in the stock of any company, association or incorporation.

#### STATUTORY PROVISIONS.

Actions may be brought to vacate or annul acts of incorporation fraudulently passed; or to vacate the charter or annul the existence of a corporation other than municipal, for violating its act of incorporation, or abuse of its powers, or failure to exercise its powers, or for doing or omitting any act which amounts to a surrender of its corporate rights, privileges and franchises, or for exercising a privilege or franchise not conferred upon it by law.<sup>1</sup>

ACT TO REGULATE INCORPORATED RELIGIOUS SOCIETIES, PASSED JAN. 30, 1855, LAWS OREGON, p. 571.

It shall be lawful for each religious denomination in this territory, in the appointment of boards of trustees for holding church property, to appoint and keep up said boards of trustees, in accordance with the economy and usages of the said religious denominations, in their separate organizations severally, by giving public notice in the church or congregation, when such boards of trustees are to be constituted, at least two successive Sabbaths previously to the time of organizing such boards of trust, for the objects contemplated in this act; the time and place of meeting to accompany said notice.

#### WASHINGTON.

Under the organic act of *Washington Territory*, laws authorizing the establishment of any corporation for banking purposes, or for issuing or circulating any kind of paper money are forbidden.<sup>2</sup>

An information may be filed against any association or number of persons who shall act as a corporation, without being legally incorporated, or where any corporation do, or omit acts, which amount to a surrender or a forfeiture of their rights and privileges as a corporation, or where they exercise powers not conferred by law.<sup>3</sup>

<sup>1</sup> Stat. O. pp. 159, 160.

<sup>2</sup> Id. 216.

<sup>3</sup> Laws W. p. 83.

## JUDICIAL DECISIONS.

Corporations have no powers, except such as are specifically granted, and must be held strictly within the limits of their granted powers.<sup>1</sup>

The "Act concerning Corporations" of 1850, provides, that no corporation created, or to be created, shall by any implication or construction, be deemed to possess the power of issuing bills, notes, or other evidences of debt, upon loans, or for circulation as money. The act however contemplates, that corporations will incur debts to the amount of the capital stock paid in. It therefore must be inferred, that they were to create the ordinary evidences of debt, and that the corporation issuing paper securities for the same would be bound thereby.<sup>2</sup>

The policy of our state has altered the rigidity of the common law, which disabled a corporation from making a contract except under its corporate seal. The act of incorporation, instead of being, as formerly, a favor granted by the sovereign to the subject, has, under our system, become a matter of right, available under general laws; under those laws, the power of corporations to create debts, is treated as an incident to the express power, and not as in itself one of the express powers. Issuing bills or notes as a circulating medium is expressly excluded; the right to issue them in all other proper cases must be inferred as an incident to the express powers or objects of the corporation. Corporations, by the general act, have power to make by-laws for the "organization of the company," the "management of its property," the "regulation of its affairs, and for carrying on all kinds of business within the objects and purposes of the company," in which there is no reason to exclude the right to make promissory notes.<sup>3</sup>

Where the charter of an old hospital is repealed and one at the same time granted for a new one providing that the board of health of the old, deliver to the trustees of the new institution, all property, real and personal, held by them in trust for the old hospital, and making it the duty of the trustees of the new hospital to "pay out of any funds which may come into their hands,

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<sup>1</sup> 5 Cal. 241.

<sup>2</sup> Id. 253.

<sup>3</sup> 6 Id. 1.

all the debts which may be owing," by the old hospital, *held*, that the trustees of the new hospital were bound to pay all the debts of the old one, without reference to the value of the property received.<sup>1</sup>

Incorporations are not bound by the acts or admissions of individual members, unless they were acting by its express authority.<sup>2</sup>

Under the act for the incorporation of railroad companies, the statute provides, that the commissioners shall ascertain, and report, the compensation proper to be made, for the land or other property, taken or injuriously affected; and is evidently intended to include every sort of damage which the owner of the land should sustain by the act of the corporation, including the building of fences, on each side of the road.<sup>3</sup>

Where shares of stock in a corporation have been regularly transferred on the books of the company, although only mortgaged as security for a loan, in a suit against the mortgagor, the mortgagee is the only proper person to be garnished; what remains to the mortgagor, is an equity in the hands of the mortgagee, to be ascertained after payment of the mortgagee debt.<sup>4</sup>

Where the by-laws of a corporated company authorize the president and secretary to transact and manage the general business of the company, a note and mortgage executed by them, on behalf of the company, binds the corporation; and where the complaint states the execution to be the act of the corporation, no further authority is necessary to be averred.<sup>5</sup>

The 12th section of the act concerning corporations, passed 22d April, 1850, provides, that whenever the capital stock of any corporation is divided into shares, and certificates thereof issued, such shares may be transferred by endorsement, but such transfer shall not be valid, except as between the parties, until the same shall have been entered on the books of the corporation; the statute is imperative, and therefore no transfer is good against third parties unless the same be made on the books of the corporation.<sup>6</sup>

A party who purchases, at sheriff's sale, stock of an incorpora-

<sup>1</sup> 2 Cal. 819.

<sup>2</sup> 6 id. 73.

<sup>3</sup> id. 74.

<sup>4</sup> 7 id. 102.

<sup>5</sup> 10 id. 441 and 396.

<sup>6</sup> 5 id. 184.

tion, knowing the certificates of such stock to be hypothecated, is chargeable with notice of the fact, and takes, subject to the claim of the pledgee. Neither the incorporation law of 1850 nor of 1853 was intended to cover a case of this kind, but to apply only to transfers and purchases, in good faith, without notice.<sup>1</sup>

A railroad company cannot refuse to transfer stock on their books, on the ground that the assignor of the stock was indebted to the company, unless the company had a lien on the stock at the date of its transfer.<sup>2</sup>

A by-law of a railroad company, passed two days after the assignment of stock, providing that no transfer of stock should be made upon the books of the company, until all indebtedness of the assignor was paid, would create no lien, to justify the company in refusing to enter the transfer on their books.<sup>3</sup>

The right of a member of an incorporated company to sue the incorporation, has never been doubted, and in this very right consists one of the essential differences, between incorporations and mere partnerships; for, in the latter, one partner cannot sue another in an action at law, but must file his bill in equity for a dissolution and an account.<sup>4</sup>

In an action against a corporation, witnesses, who were members of the corporation at the time the liabilities were incurred for which the action is brought, are incompetent on account of interest. By the 15th section of the act of 1853, "to provide for the formation of corporations," the liability of a stockholder continues for "all debts contracted during the time that he was a stockholder."<sup>5</sup>

In an action against a corporation, by its corporate name, the sheriff's return must show, that the summons was served on the president, secretary, cashier, or managing agent thereof, as named in the 20th section of the Practice Act, and service made upon any other party, though a stockholder, is void.<sup>6</sup>

A joint-stock association, formed for a definite period, cannot be voluntarily dissolved, except by the unanimous consent of all

<sup>1</sup> 6 Cal. 435.

<sup>2</sup> 9 Id. 113.

<sup>3</sup> 5 Id. 299.

<sup>4</sup> 6 Id. 80.

<sup>5</sup> Id. 184.

the stockholders; if such consent cannot be had, then application must be made to a court to decree a dissolution.<sup>1</sup>

Two corporations cannot hold land together as joint tenants.<sup>2</sup>

A telegraph company is liable for the neglect of its agent in failing to transmit a message in due season. The same principles of law apply in such a case as in that of a common carrier.<sup>3</sup>

#### FORMS.

##### *Election of Directors of the Pacific and Atlantic Railroad Company.*

At a meeting of the stockholders of the "Pacific and Atlantic Railroad Company," held at San José on the 1st day of January, 1853, in pursuance of a notice duly published in the *Placer Times and Transcript*, and other papers in San Francisco, and in the *San José Telegraph*, and *Santa Clara Register*, by the board of commissioners for receiving subscriptions to the stock of said company, the undersigned, being a majority of said board of commissioners, presided in pursuance of the statute in such case made and provided, and acted as inspectors of the votes of said stockholders for president and directors of said company.

The whole number of shares of the stock of said company is

For the office of president, A. B., of San Francisco, received the vote of \_\_\_\_\_ shares, being all the votes cast, and was declared to be unanimously elected.

The following are the names of the \_\_\_\_\_ directors with the votes of each respectively.

C. D. of San Francisco, 500 shares.

E. F. " San José, &c. "

We hereby certify that the above is a correct statement of the election of president and directors of said company, and of the result thereof.

C. D. }  
E. F. &c., &c. } Commissioners.

##### *Certificate of Incorporation of Telegraph Company.*

State of California, }  
City and County of San Francisco, } ss :

We \_\_\_\_\_, do hereby certify and declare: That we have this day associated ourselves together as a company, for the purpose of constructing and putting in operation a line of wires

<sup>1</sup> 1 Cal. 55.

<sup>2</sup> 2 Id. 239.

<sup>3</sup> Parks v. Alta Tel. Co. April Term, 1859.

of electro-magnetic telegraph from the city of San Francisco, by way of the city of San José, the towns of Santa Cruz and Monterey, and other intermediate points, to the city of Los Angeles, under and in pursuance of an act of the legislature of the state of California, entitled "An Act concerning Corporations," passed April 22d, 1850.

And we further certify and declare as follows, to wit:

*First.* That the corporate name to distinguish such company and association, and to be used in its dealings, and by which it shall sue and be sued, is and shall be "The Pacific and Atlantic Telegraph Company."

*Second.* That the general route of said line of telegraph is and shall be the most practicable and direct route from the city of San Francisco by way of the city of San José, the town of Monterey, the town of Santa Cruz, and other intermediate points and places to the city of Los Angeles.

*Third.* That the capital stock of said association is and shall be \_\_\_\_\_ dollars, which capital stock is and shall be divided into \_\_\_\_\_ shares of stock, each share of which shall represent \_\_\_\_\_ dollars, of the capital stock of said company.

*Fourth.* That the names and places of residence of the persons holding shares in said association and company, and the number of shares held by each of them respectively, are as follows, to wit:

NAME.	PLACE OF RESIDENCE.	NO. OF SHARES.
A. B.	San Francisco,	500
C. D.	" " &c., &c.	

*Fifth.* That said association and company shall commence on this day of \_\_\_\_\_ A. D. and shall continue for the period of \_\_\_\_\_ years next thereafter, and shall terminate at the expiration of said time.

In witness whereof, we have hereunto set our several hands and seals this \_\_\_\_\_ day of \_\_\_\_\_ A. D. at the city and county of San Francisco (signed in duplicate).

Sealed and signed in }	A. B. [L. S.]
presence of J. B. }	C. D. [L. S.]
	E. F. [L. S.]

*Certificate of Incorporation of the San Francisco Dock and Wharf Company.*

The undersigned trustees of the San Francisco Dock and Wharf Company, in conformity with the requirements of an act entitled "An Act to provide for the formation of corporations for certain purposes," passed \_\_\_\_\_ day of \_\_\_\_\_, do certify that they desire to form a corporation for wharfing, dockage and general warehousing purposes, under the name and style of "The

San Francisco Dock and Wharf Company," and to incorporate the same for \_\_\_\_\_ years, from the \_\_\_\_\_ day of \_\_\_\_\_ A. D.

The said corporation to pursue the business of wharfing, dockage and warehousing, in the city of \_\_\_\_\_ and county of \_\_\_\_\_, the principal place of business of the company, with a capital of \_\_\_\_\_ dollars, represented by \_\_\_\_\_ shares of stock, divided into shares of \_\_\_\_\_ dollars each. Said corporation to purchase and sell such real estate as may be deemed necessary by its trustees to carry on said business, or which may be obtained by purchase or otherwise in the course of its business.

To build a sea-wall or bulkhead, wharfs, piers, docks and warehouses, and to purchase or lease the same, with the rights, franchises or contracts appurtenant, to hire or build such warehouses as may be required to carry on said wharfing and dockage, and the business incident thereto; and generally to possess powers sufficiently ample and extensive to meet the requirements of the increasing business in which said corporation may engage.

The undersigned do further certify, that the number of trustees of the San Francisco Dock and Wharf Company, herein incorporated under the before-mentioned act, shall be \_\_\_\_\_ as follows, namely, A., B., C., &c., of the city of \_\_\_\_\_, who shall manage the concerns of the company for the first \_\_\_\_\_ months, and until their successors are lawfully elected. Dated this \_\_\_\_\_ day of \_\_\_\_\_ A. D.

A.  
B.  
C., &c.

*Certificate of the Trustees of the Quartz and Tailing Mining Company, of Amador County.*

This is to certify that the undersigned have this day united themselves, and formed a corporation, under the corporate name of the Quartz and Tailing Mining Company of Amador county.

The company is formed for the purpose of extracting gold and other metals from all ores, in the county of Amador, in the state of California, by a new process discovered by Messrs.

\_\_\_\_\_, and for acquiring, by purchase or otherwise, such real and personal estate as may be necessary to carry on the above-described undertaking.

The amount of the capital stock of the company shall be \_\_\_\_\_ dollars.

The time of its existence shall be \_\_\_\_\_ years.

The stock shall consist of \_\_\_\_\_ shares of \_\_\_\_\_ dollars each.

There shall be three trustees, and A., B., and C., shall be the

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to manage the concerns of the company for the first six months.

The principal place of business of the company shall be located in the city of \_\_\_\_\_  
in witness whereof we have hereunto set our hands, at San Francisco on this \_\_\_\_\_ day of \_\_\_\_\_ A. D.

A.  
B.  
C.

***Certificate of Incorporation.***

*Certificate of Incorporation* of the San Mateo and San Francisco Water Company, a corporation formed for the purpose of furnishing and supplying the city of \_\_\_\_\_ and county of \_\_\_\_\_ with fresh and pure water.

Article 1. The corporate name of this corporation is and shall be "The San Mateo and San Francisco Water Company."

Art. 2. The principal place of business of said corporation is intended to be within the counties of \_\_\_\_\_, and the principal place of business (or office) of said corporation shall be the city of \_\_\_\_\_, state of \_\_\_\_\_.

Art. 3. The objects for which this corporation is formed are to supply the city of \_\_\_\_\_ and county of \_\_\_\_\_ with fresh and pure water, by conducting and conveying the waters of \_\_\_\_\_ river into, and distributing the same, by means of aqueducts and pipes, through the streets and buildings of said city of \_\_\_\_\_ and county of \_\_\_\_\_, and selling the said water.

Art. 4. The amount of the capital stock of this corporation is and shall be the sum of \_\_\_\_\_ dollars, and the same shall be divided into \_\_\_\_\_ shares of \_\_\_\_\_ dollars each.

Art. 5. This corporation shall continue for the period of \_\_\_\_\_ years from the \_\_\_\_\_ day of \_\_\_\_\_, A. D.

Art. 6. There shall be \_\_\_\_\_ trustees of this corporation, who shall manage the concerns of the said corporation for the first \_\_\_\_\_ months after the formation of this corporation. The names and residence of said first \_\_\_\_\_ trustees are as follows:

A. B., of \_\_\_\_\_

C. D., of \_\_\_\_\_

In witness whereof the undersigned have hereunto subscribed their names (and to a duplicate hereof), at \_\_\_\_\_, this \_\_\_\_\_ day of \_\_\_\_\_, A. D.

A. B.  
C. D.



*Certificate of Incorporation of the Savings and Loan Society.*

We, the undersigned, hereby certify, that we have associated ourselves together for the purpose of forming a society, and that we desire to incorporate the same under the provisions of an act entitled "An Act to provide for the formation of Corporations for certain purposes," passed \_\_\_\_\_, and in conformity with the requirements of said act, we hereby further certify, that the corporate name of this corporation be The Savings and Loan Society; that the object for which it is formed is, that by means of it the members thereof may be enabled to find a secure and profitable investment for small savings, and may have an opportunity of obtaining from it the use of a moderate capital, on giving good and sufficient security for the repayment of the same; that the amount of its capital stock shall be

\_\_\_\_\_ dollars, and the number of shares of which said stock shall consist shall be \_\_\_\_\_; that the society shall go into operation as soon as \_\_\_\_\_ shares shall have been subscribed for, and an instalment of \_\_\_\_\_ dollars per share paid thereon; that the time of its existence shall be \_\_\_\_\_ years, from and after the filing of this act of incorporation; that the number of trustees for the first \_\_\_\_\_ months shall be \_\_\_\_\_, and that their names are A., B., C. and D., and that the principal place of business of the society shall be \_\_\_\_\_.

In testimony whereof we have hereunto set our hands and seals, in duplicate, in the city of \_\_\_\_\_, this \_\_\_\_\_ day of \_\_\_\_\_, A. D. \_\_\_\_\_.

A. [L. s.]  
B. [L. s.]  
C. [L. s.]  
D. [L. s.]

*Certificate of Association of the Los Angeles Vineyard Society.*

This is to certify that the subscribers hereto have this \_\_\_\_\_ day of \_\_\_\_\_, in the year of our Lord \_\_\_\_\_ (under the act of the legislature of the state of \_\_\_\_\_, entitled "An Act to provide for the formation of Corporations for certain purposes," approved \_\_\_\_\_) associated themselves together as a corporation for the purpose of manufacturing wine from grapes grown in the county of \_\_\_\_\_, in the said state of \_\_\_\_\_; and have determined and agreed as follows:

1st. That the name of said association shall be the Los Angeles Vineyard Society, and that the capital stock of said company shall be \_\_\_\_\_ dollars, divided into \_\_\_\_\_ equal shares of \_\_\_\_\_ dollars each, and that the principal place of business shall

be in \_\_\_\_\_, county of \_\_\_\_\_, state of \_\_\_\_\_, and that the mechanical operations of said company shall be conducted in the said county of \_\_\_\_\_, at the rancho called \_\_\_\_\_

2d. That the duration of said association shall extend to and embrace the \_\_\_\_\_ day of \_\_\_\_\_, A. D.

3d. The affairs of said association shall be managed by a board of \_\_\_\_\_ trustees, whose names are as follows, to wit: A., B., C. and D., they being the trustees appointed by the said association to manage its business, under the constitution and by-laws adopted for the first \_\_\_\_\_ months after the incorporation of the said company, and until such time as other trustees are elected, under the said constitution and by-laws, to succeed them.

A. [L. s.]  
B. [L. s.]  
C. [L. s.]  
D. [L. s.]

*Certificate of Incorporation of Benevolent Society.*

State of California, } ss:  
City and County of San Francisco, }

We, the undersigned members of La Société Française de Bien-faisance Mutuelle, and judges of the election held as hereinafter mentioned, do hereby certify,

That at a meeting of said society, held on the \_\_\_\_\_ day of \_\_\_\_\_, A. D. \_\_\_\_\_, in the city of \_\_\_\_\_, after due notice thereof previously given by publication in the \_\_\_\_\_ newspaper, printed and published in \_\_\_\_\_ city, and in accordance with the \_\_\_\_\_ article of the by-laws of the society, and which meeting was held for the purpose of electing two trustees of the said society, in the place of A. B. and C. D., resigned, E. F. and G. H. were duly elected by a majority of the votes cast at such election, as trustees of the said society, in the place of A. B. and C. D.

Witness our hands, this \_\_\_\_\_ day of \_\_\_\_\_ . L. [L. s.]  
T. [L. s.]  
S. [L. s.]

Judges of Election.

*Certificate of Incorporation of Ladies' Seamen's Friend Society.*

We, the undersigned, do hereby certify, that, at a meeting of the board of managers of the Ladies' Seamen's Friend Society, of the port of \_\_\_\_\_, held in the city of \_\_\_\_\_ and county of \_\_\_\_\_, on the \_\_\_\_\_ day of \_\_\_\_\_, in the year \_\_\_\_\_, for the election of a board of trustees of

said society, in accordance with the provisions of the constitution of said society and statutes in such case made and provided, we, A. B. and C. D., were duly appointed the judges of such election, and counted the votes of the members and declared the result.

And we do further certify that at the said election, E. F., G. H. and I. J., were duly elected trustees of said society, and that the said trustees and their successors in office are forever hereafter to be called and known as a corporation by the corporate name of "The Board of Trustees of the Ladies' Seamen's Friend Society" of the port of \_\_\_\_\_, all which is hereby certified according to the provisions of the act entitled "An Act concerning Corporations."

Witness our hands and seals, this \_\_\_\_\_ day of \_\_\_\_\_, A. D.  
 A. B. [L. s.]  
 C. D. [L. s.]

*Certificate, &c., for Orphan Asylums.*

To all to whom these presents shall come, greeting:

This is to certify that we, the undersigned A., B., and C., being desirous to act in concert, and to become and form an incorporate company or society, pursuant and according to the laws of the state of California, concerning corporations, have this day associated as such corporation for the purposes hereinafter set forth.

The objects and purposes for which our corporation or society is formed are as follows:

*First.* For the care, relief and protection of orphans.

*Second.* For the protection, care and relief of sick, disabled and indigent persons.

*Third.* For literary and educational purposes, and establishing, maintaining and conducting one or more schools to accomplish this object.

That the corporate name of our society is "The Roman Catholic Orphan Asylum," and its purposes and objects only those before stated.

That the time of our existence as such society is only \_\_\_\_\_ years.

That the capital stock of the association is only \_\_\_\_\_ dollars.

That the stock is not divided into any distributive number of shares, but is owned and held by all in common.

That A., B. and C., trustees, are \_\_\_\_\_ appointed to manage the concerns of said society for the period of \_\_\_\_\_.

And that the city of \_\_\_\_\_ in the state of \_\_\_\_\_, is where the principal place of business of the company or society is to be located.

A. [L. s.]  
 B. [L. s.]  
 C. [L. s.]

*Certificate, &c., of a German Benevolent Society.*

State of \_\_\_\_\_, } ss:  
 City of \_\_\_\_\_ County of \_\_\_\_\_

To all whom these presents may concern:

We, A., B. and C., residents of the city of \_\_\_\_\_ county of \_\_\_\_\_ and state aforesaid, members of the society hereinafter mentioned, and judges of election at the meeting hereinafter mentioned, do certify: That on the \_\_\_\_\_ day of \_\_\_\_\_ A. D. \_\_\_\_\_, a meeting of the members of the German General Benevolent Society—a society not yet incorporated—was holden, agreeably to public notice, for the purpose of incorporating themselves, pursuant to the provisions of an act, passed by the legislature of the state of \_\_\_\_\_, on the \_\_\_\_\_ day of \_\_\_\_\_ A. D. \_\_\_\_\_ entitled \_\_\_\_\_, and the said meeting, having been duly organized, J. B. presiding, and S. B. acting as secretary, did then and there unanimously resolve, that said society should thenceforth assume corporate powers in pursuance with the act referred to, and should forever thereafter be called and known as the "German General Benevolent Society." And we further certify, that the said society at the meeting on the \_\_\_\_\_ day and year aforesaid, proceeded to an election by ballot, of officers for the said society for the term of \_\_\_\_\_ thence next ensuing, and that we the said A., B. and C. having been duly appointed judges of said election, upon canvassing all the votes polled at said election, did return the following persons elected as officers of said society, viz.: D., E., F. and G. And said meeting did then and there unanimously determine, that said officers, and their successors should forever thereafter be called and known by the name and style of "The Board of Directors of the German General Benevolent Society," and that the said board of directors shall have the full charge and control of the estate and property, and the management of all affairs relating to the estate of said society, pursuant to the provisions of the statute above mentioned.

And we further certify, that said election was fairly and legally conducted, and in strict conformity with the rules and regulations of said society.

In witness whereof we have hereunto set our hands and seals, this \_\_\_\_\_ day of \_\_\_\_\_, A. D. \_\_\_\_\_.

A. [L. s.]

B. [L. s.]

C. [L. s.]

*Certificate of Incorporation of a Cigar Makers' Association.*

We, the undersigned, hereby certify, that, in pursuance of the provisions of an act of the legislature of the state of \_\_\_\_\_, entitled \_\_\_\_\_, we have formed an association under the corporate name of "The Cigar Makers' Association" of \_\_\_\_\_

That at an election for trustees of said association holden at \_\_\_\_\_, in the month of \_\_\_\_\_, A. D. \_\_\_\_\_, of which election the undersigned members of said association were judges, the following named persons were elected trustees of said association, for the term of \_\_\_\_\_ months, and, as such trustees, they and their successors are entitled to exercise all the powers and duties conferred upon them by the act aforesaid, viz., A., B. and C.

That the name by which said trustees and their successors shall forever hereafter be called and known, is "The Trustees of the Cigar Makers' Association of \_\_\_\_\_."

That the objects of the association are—

1st. To form a more perfect union among the members of our trade.

2d. The creation of a fund for the benefit of the members of the association, and for the support of all who are sick and helpless.

3d. The care and protection of all sick and disabled members of the association.

And the term of existence of said association shall be \_\_\_\_\_ years; and the fund aforesaid shall be invested and appropriated to the said purposes in such manner as the constitution and by-laws of said association shall direct.

In witness whereof we have hereunto set our hands and seals, at \_\_\_\_\_, this \_\_\_\_\_ day of \_\_\_\_\_, A. D. \_\_\_\_\_

E. [L. s.]  
F. [L. s.]

*Incorporation of a Lodge.*

This is to certify, that on the \_\_\_\_\_ day of \_\_\_\_\_, at a regular meeting of Morning Star Temple of Honor, No. 2, in \_\_\_\_\_, state of \_\_\_\_\_, the following persons whose names here appear, viz., A. B., C. D., E. F., were, in accordance with the constitution and laws of said Temple of Honor, duly elected trustees, known and to be hereafter forever known as "The Board of Trustees of funds and investments of Morning Star Temple of Honor, No. 2."

This further certifies that I, A. B., on the evening, and at the

meeting aforesaid, was the legal and constitutional W. C. T. of said Temple of Honor, and acted as judge of said election.

, A. D. . A. B.

*Incorporation of the Chinese Mission of the State of California.*

CERTIFICATE OF THE ELECTION OF TRUSTEES.

We, the undersigned, subscribers to the fund for the establishment of the Chinese Mission for the state of , a religious association, located at the city of , in said state, certify that, pursuant to notice previously given, we convened in the city of , on the day of , A. D. , for the purpose of electing five trustees of said association—that A. was chosen chairman, and B. secretary, and the meeting being thus organized, we proceeded to the election of five trustees, and the following named persons were duly elected trustees of the Chinese Mission for the state of , to be thereafter known and called by such name and title: A., B., C., D. and E.

Dated at , the day of , A. D. .

C. K.  
I. L.

*Report of Trustees of a Benevolent Association.*

The Chinese Mission for the state of California, by the trustees report, that the property, real and personal, held in trust by them consists of , in the city of San Francisco, originally costing dollars, and now to be valued at , and that the said corporation are indebted to in the sum of

A. B., Trustee.

*Incorporation of a Church.*

We, the undersigned, members of the First Congregational Society of , and judges of election at a meeting of said society, held in the vestry of the church on street, on evening, the day of , A. D. , pursuant to notice previously given, in accordance with the constitution of said society, do hereby certify, that at the meeting aforesaid, Messrs. A., B., C., D., E., and F., were duly chosen by ballot as trustees of said society, they and their successors to be known hereafter as "The Board of Trustees of the First Congregational Society of ," and as such to have charge of all the property of said society, and perform all the duties usually connected with the office; and that immediately after the said election the said six trustees were divided by lot into three

classes of two in each class, in accordance with Article A. of the constitution of said society, Messrs. A. and B. to hold their offices until the next annual meeting of the society, and until their re-election or others shall be elected in their places; Messrs. B. and C. to hold their offices until the second annual meeting hereafter, and until their places shall be filled by a new election; and Messrs. D. and E. to hold their offices until the third annual meeting hereafter, and until a new election to supply their places. So that at each annual meeting of the society there shall be elected two trustees to supply the places of the two trustees whose term of office shall then expire, who shall hold their offices for the term of three years, and until suspended by a new election.

We also certify, that A. was chosen as moderator of the society and chairman of the board of trustees; B. as treasurer; and C. as clerk, to hold their offices for

Witness our hands and seals in \_\_\_\_\_, this \_\_\_\_\_ day of \_\_\_\_\_, A. D.

Signed and sealed in }  
presence of G. H. }

C. [L. s.]

M. [L. s.]

Judges of Election.

### *Report of Trustees of a Church.*

To the First Presbyterian Society in the city of \_\_\_\_\_, state of \_\_\_\_\_:—

The undersigned trustees of your society, in pursuance of the section of an act of the legislature of the state aforesaid, entitled \_\_\_\_\_ passed \_\_\_\_\_ respectfully report that the following is all the property, real and personal, held by your trustees in trust for said society, to wit: \_\_\_\_\_, and valued by us in all at \_\_\_\_\_ dollars, which property is subject to a mortgage of \_\_\_\_\_ dollars now over due and on interest, payable \_\_\_\_\_ at the rate of \_\_\_\_\_ per \_\_\_\_\_.

There is also a street assessment lien upon said property for grading and planking in front thereof, amounting to \_\_\_\_\_ dollars.

There is also owing and due to the Rev. \_\_\_\_\_, the sum of \_\_\_\_\_ dollars, as pastor of \_\_\_\_\_, from the \_\_\_\_\_ day of \_\_\_\_\_, to the \_\_\_\_\_ day of \_\_\_\_\_.

And there is now due to said society from individual pew-holders, for rent from \_\_\_\_\_, to \_\_\_\_\_, the sum of \_\_\_\_\_ dollars.

All of which is respectfully submitted.

A. B.

C. D.

E. F.,

Secretary of the Board.

*Proceedings by a Church to Effect a Loan by Mortgage.*

## PETITION.

To the Hon. the District Court of the Twelfth Judicial District of the &c., &c.

Your petitioners, "The trustees of the \_\_\_\_\_ church of the city of San Francisco," in the said state of California, represent to this honorable court—That they are a religious corporation duly incorporated according to the provisions of the statutes of this state, under the corporate name of "The trustees of the \_\_\_\_\_ church of the city of San Francisco."

That they are seized and possessed as such trustees as aforesaid, of certain real estate situated in said city and county of San Francisco, bounded and described as follows, viz.: [*Here insert description.*]

Your petitioners further represent that A. B., C. D., E. F., &c., are the present trustees of said church and compose said corporation; and that A. B. is president, and C. D. secretary of said board of trustees.

Your petitioners further represent that there is erected and now standing and being upon said lot hereinbefore described, a large and valuable building used by said church and the congregation connected therewith, for stated meetings for religious worship.

That the said corporation is now indebted in the sum of about \$5,000, which indebtedness has been contracted for the improvement of said property, and the benefit of said church and congregation.

And your petitioners further represent that the immediate necessities of said church and corporation require that said trustees should have at their disposal, for the meeting of the necessities of said church and congregation, the sum of \$5,000.

Your petitioners further represent that they have no money whatever on hand belonging to said corporation.

That the current receipts are about sufficient to meet the current expenses of said church and the interest on the sum of \$5,000, at the rate of one and one-half per cent. per month.

And your petitioners further represent that they can procure the said sum of \$5,000 for the period of one year, with the privilege of continuing the same for two years, at the rate of one and one-half per cent. per month interest, and that your petitioners are unable to obtain the same at any less rate of interest, or on any more favorable terms than above named.

And your petitioners further represent that at a meeting of the said church and congregation, held at the meeting-house of said church on the \_\_\_\_\_ day of \_\_\_\_\_ A. D.



a resolution was adopted by a unanimous vote of the members present, directing your petitioners to effect a loan not exceeding \$5,000, for the purposes above named, a copy of which resolution is hereto annexed, marked "A." That said meeting at which said resolution was adopted was duly called and notice thereof given from the pulpit on the preceding Sabbath for that especial purpose.

And your petitioners further represent that, in accordance with said resolution, your petitioners have this                      day of A. D.                      held a meeting at which all the members of said corporation were present, where a resolution was duly adopted, a copy of which is hereto annexed marked "B."

And your petitioners represent that it would be for the benefit and interest of said church and congregation that said loan should be made, and said note and mortgage executed.

Wherefore your petitioners pray that an order may be made by this court for the mortgaging of said real estate to secure the payment of such loan, not exceeding \$5,000, as said corporation can effect for the period of one year or longer, not exceeding two years, at a rate of interest not exceeding one and one-half per cent. per month; and also allowing said corporation trustees as aforesaid, to make and deliver with said mortgage a promissory note, under the corporate seal and in the corporate name of said corporation, for the said sum so obtained as aforesaid, to any person furnishing said sum of money as aforesaid.

Dated

A. B.

C. D.

E. F., &c.,

Trustees of the Church, San Francisco.

City and County of San Francisco, ss:

C. D., of said city and county, being duly sworn, says, that he is a member and secretary of said corporation, in the foregoing petition mentioned. That he has read the said petition and that he believes the same to be true.

Sworn before me this

C. D.

day of

A. D. 1859.

[L. s.]

R. H. SINTON, Notary Public.

*A.—Resolution referred to in foregoing Petition.*

At a meeting of the church and congregation of the church of the city of San Francisco, California, held pursuant to call and due notice for that purpose, on the                      of                      A. D.                      the following resolution was adopted by a unanimous vote of all the members present:

*Resolved*, that the trustees of this church be and they are

hereby instructed to procure a loan not exceeding five thousand dollars (\$5,000), for a period not exceeding two years, at a rate of interest not exceeding one and a half per cent. per month, to pay the present indebtedness and meet such other present necessities as the corporation shall be compelled to meet for the benefit of the church; and the said trustees are also instructed to make application to the Twelfth District Court for an order allowing them to make and execute a promissory note and mortgage on the real property of said corporation for the amount; and on obtaining such order, to execute and deliver to any person who will furnish such sum of money on the terms aforesaid, a note and mortgage for such sum, according to law.

C. D., Clerk.

*B.—Resolution referred to in foregoing Petition.*

At a meeting of the trustees of the \_\_\_\_\_ church of the city of San Francisco, held on the \_\_\_\_\_ day of \_\_\_\_\_, 1858, all the members being present, the following resolution was adopted:

*Resolved*, that the petition drawn up to be presented to the twelfth district court be now signed by the members of the board; and that said petition be then presented to said court, and that on obtaining the proper order therefor, a loan not exceeding \$5,000 be made, and a note and mortgage executed therefor, according to law and the terms of said order.

C. D., Secretary of the Board, &c.

*Order of Publication on the foregoing Petition.*

Twelfth District Court, City and County of San Francisco.  
In the matter of the application of \_\_\_\_\_ }  
trustees \_\_\_\_\_ church, for power to }  
mortgage, &c. }

On reading the annexed petition of "The Trustees, &c.," a religious corporation, and on motion of A. B., in behalf of said corporation,

It is ordered that said petition be presented, and said application made to the said twelfth district court, at the court-room thereof, &c., on \_\_\_\_\_, the \_\_\_\_\_ day of \_\_\_\_\_, A. D. \_\_\_\_\_, at the opening of the court on that day, or as soon thereafter as said application can be heard.

And it is further ordered that a notice of said application be published in the \_\_\_\_\_, a newspaper printed and pub-

lished in said city and county, each day for five days immediately preceding said application.

Dated

EDWARD NORTON,  
Judge Twelfth District.

NOTICE.

Twelfth District Court.

In the matter of the application of the }

Trustees of Church to mortgage, &c. }

Notice is hereby given, that application will be made by "The Trustees, &c.," a religious corporation, to the District Court, &c., on, &c., at the court room, &c., at the opening of the court on that day, or as soon thereafter as such application can be heard, for an order allowing the corporation aforesaid to execute a promissory note for a sum not exceeding \$5,000, and also to execute a mortgage upon the real estate of said corporation, to secure payment thereof.

Dated, &c.

WILLIAM DUEB, Clerk.  
By W. R. SATERLEE, Deputy.

*Affidavit of Publication of the above Notice.*

City and County of San Francisco, ss:

A. B. of the said county being duly sworn, deposes and says that he is the proprietor and publisher of the newspaper published daily in said county, and has charge of all the advertisements in said newspaper, and that the foregoing notice in the case of "The Trustees &c.," has been published in the  
to \_\_\_\_\_, 1858, and further sayeth not. A. B.

Sworn to this \_\_\_\_\_ day of \_\_\_\_\_, }  
A. D. \_\_\_\_\_ before me. }

[L. s.]

C. D., Notary Public.

*Order of Court, authorizing the Church to give the Mortgage, &c.*

In the District Court of the Twelfth Judicial District, City and County of San Francisco.

In the matter &c., of \_\_\_\_\_ church. }

In the above entitled matter, on reading and filing the petition of "The Trustees &c.," and it satisfactorily appearing to me therefrom, that it will be to the benefit, interest and advantage of such church and congregation, to grant the prayer of said petition, and it also satisfactorily appearing to the court, by competent proof, that due notice of this application has been given.

Now, therefore, on application of said trustees, by their attor-

## CHAPTER XVI.

## DEEDS.

A DEED is a written instrument containing some contract or agreement sealed and delivered: but in the general use of the term, it signifies a conveyance or transfer of land, or of some interest in land.

A conveyance of land or of any estate therein, may be made by deed, signed and sealed by the person from whom the estate or interest is intended to pass, being of lawful age, or by his lawyer or attorney, and duly acknowledged, or proved and recorded.

The estate of infants, idiots, persons of unsound mind, and incompetent persons, can only be conveyed by their guardians, under certain regulations and restrictions provided by law.

A married woman may convey her real estate by joint deed with her husband, provided the same be properly acknowledged.<sup>1</sup> And when her husband is not, and for a year preceding the conveyance has not been *bona fide* residing in this state, she may convey her real estate as fully and perfectly as if she were single, upon acknowledgment before the district judge of the county where the land lies, and the certificate of the judge made upon the testimony of two credible disinterested witnesses to the fact.<sup>2</sup>

Males are deemed of full and legal age at twenty-one years, and females at eighteen, or at any age under eighteen, when, with the consent of the parent, guardian or other person under whose care or government they may be, they shall have been lawfully married;—and at those ages respectively are competent to convey real estate, make contracts and do all other acts and things, that persons of full age may legally do.<sup>3</sup>

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<sup>1</sup> W. D. arts. 889 and 896-890. See chapter  
ON ACKNOWLEDGMENTS and on HUSBAND AND  
WIFE.

<sup>2</sup> W. D. art. 2690.

<sup>3</sup> Id. 2811; Laws 1898, p. 109.

A deed should be founded on a sufficient consideration, and executed by persons able to contract and be contracted with; the subject matter must be set forth in sufficient words to describe the agreement, and bind the parties; and it should be read by or to the grantor, previous to the execution, unless the reading is expressly waived. The consideration of a deed may be either good or valuable; it must not partake of any thing immoral, illegal, or fraudulent. Every deed, or contract, is void, when made for any fraudulent purpose, or in violation of law. A *good* consideration is founded upon natural love and affection between near relations by blood; a *valuable* consideration is founded on something deemed valuable, as money, goods, services, or marriage. An equitable liability is sufficient to uphold an express covenant or promise.

Where the consideration is expressed in a deed, any averment to the contrary cannot be made, although it may be inquired into, for all purposes, except to impeach the deed as between the parties; nor will the validity of a deed depend on the amount of the consideration.

In the construction of every instrument granting or conveying, or authorizing the creation or conveyance of, any estate or interest in lands, it is the duty of courts of justice to carry into effect the intent of the parties, so far as such intent can be collected from the whole instrument, and is consistent with the rules of law. Material erasures or interlineations in a deed, should always be noted before the execution.<sup>1</sup>

When a deed is executed by an attorney, for several principals, one seal is sufficient, provided it appear that the seal affixed was intended to be adopted as the seal of all.<sup>1</sup> The attorney should sign the name of the principal by himself, writing his own name under that of the principal, with the words, "By his attorney in fact." See accompanying Forms.

The rule in relation to the description of premises conveyed by metes and bounds is, that known and fixed monuments control courses and distances; and the certainty of metes and bounds will include all the lands within them, though they vary from the quantity expressed in the deed. Where natural and

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<sup>1</sup> Wood's Dig. art. 1180.

fixed objects are wanting, and the course and distance cannot be reconciled, the one or the other may be preferred, according to circumstances.<sup>1</sup>

Where land is conveyed by metes and bounds, if the description contains positive language as to quantity, it is to be regarded as descriptive only, and not as a covenant of quantity.<sup>2</sup>

In drawing deeds for exchange of lands, or amicable partition, the true and actual consideration, or the value thereof, should be expressed, so that in the event of eviction, or failure of title of either portion, the amount of the recovery by the losing party, if he is entitled to recover for his loss, may be fixed.

A deed will not take effect, so as to vest the estate or interest intended to be conveyed, except from the time of its delivery. Almost any act of the party executing a deed, importing an intention to deliver it, will be sufficient; or it may be delivered as an *escrow*, on conditions, and will take effect, on the performance of such conditions, from the time of the delivery.<sup>3</sup>

No estate or interest in lands, other than leases for a term not exceeding one year, nor any trust, or power, over or concerning lands, or in any manner relating thereto, can be created, granted, assigned, surrendered, or declared, unless by act or operation of law, or by deed, or conveyance in writing, subscribed by the party creating, granting, assigning, surrendering, or declaring the same, or by his lawful agent thereunto authorized by writing.<sup>4</sup>

This section cannot be construed to affect in any manner the power of a testator in the disposition of his real estate by a last will and testament, nor to prevent any trust from arising or being extinguished by implication or operation of law.<sup>5</sup>

By the statute of California the term "heirs," or other words of inheritance, are not necessary to create or convey an estate in fee simple; and every conveyance of real estate passes all the estate of the grantor, unless the intent to pass a less estate shall appear by express terms, or be necessarily implied in the terms of the grant.<sup>6</sup> The words "grant, bargain and sell," unless restrained by express terms, contained in the conveyance, are construed to be the following express covenants and none other, on

<sup>1</sup> Stanley v. Green, January Term, 1859.

<sup>2</sup> Id. 895.

<sup>3</sup> Flake v. his creditors, January Term, 1859.

<sup>4</sup> Id. 881.

<sup>5</sup> Wood's Dig. art. 894.

the part of the grantor for himself, his heirs and assigns, and may be sued on as such.

1. That previous to the time of the execution of such conveyance, the grantor has not conveyed the same real estate, or any right, title or interest therein, to any person other than the grantee. 2. That such real estate is at the time of the execution of such conveyance, free from incumbrances done, made or suffered by the grantor, or any person claiming under him.<sup>1</sup>

It is not necessary that the grantor should be in possession, but even if the land is held adversely he may sell and convey his interest therein.<sup>2</sup>

If conveyance be made in fee simple absolute, and the grantor have not the legal estate, but should afterward acquire the same, the legal estate subsequently acquired passes immediately to the grantee, and the deed is as valid as if such legal estate had been in the grantor, at the time of the conveyance.<sup>3</sup>

Contracts for the sale of lands or any interest therein, or for leasing for over a year, are void unless the contract or some note or memorandum thereof, expressing the consideration be in writing and subscribed by the party making the lease or sale, or by his lawfully authorized agent.<sup>4</sup>

Under the Mexican law and the customs of California, where land was conveyed by deed, it was requisite that the writing should contain at least the names of the parties, the thing sold, the date of the transfer and the price paid.<sup>5</sup>

Deeds of gift, where no valuable consideration passes, may be made, and when made understandingly and without fraud, will be held good. A gift of personal property may be made without deed, but to avoid doubt, a writing is generally passed. To make a deed of gift complete and valid, the property must be delivered. The gift is then executed, and is binding.

Gifts *causa mortis* are gifts made in contemplation of death; which take effect if the death occurs, provided the property is not needed for the payment of the debts of the deceased.

All gifts are void, which are made to hinder, delay and defraud

<sup>1</sup> Wood's Dig. art. 888.

<sup>2</sup> Id. 871.

<sup>3</sup> Id. 870.

<sup>4</sup> W. D. art. 896 and 897.

<sup>5</sup> 7 Cal. 158; 10 id. 12.

creditors, so far as such creditors are concerned, even where the gift is made as a settlement upon the wife or children of the donor.

In California, a deed of gift may be made by the husband to the wife directly, without the intervention of a third party as trustee or otherwise.<sup>1</sup>

In this state, every conveyance or other instrument in writing, conveying or affecting real estate, or any instrument in writing by which any real estate or interest in real estate is created, aliened, mortgaged or assigned, except wills, leases for a term not exceeding one year, and executory contracts for the sale or purchase of lands, properly proved or acknowledged and certified, may be recorded in the county where the land affected by the instrument lies, and (with the exception of powers of attorney) may be used in evidence without further proof; or if recorded and lost, the record, or a certified copy of the record may be used in evidence, subject to being rebutted by proof of incompetency of the witness by whom the execution of the instrument purports to have been proved.<sup>2</sup>

Conveyances or deeds affecting lands are of force between the parties without recording; but in order to give notice to third parties, the deed should be recorded in the office of the recorder of the county in which the land lies; and except where there are special and important reasons for not placing the deed at once upon record, it is recommended that every deed should be recorded as soon as possible after it has been properly acknowledged or proved. For the law and forms on the subject of acknowledgment and proof, see the title ACKNOWLEDGMENT in this book.

Recording a deed is held to be notice to a *prior* purchaser or incumbrancer only when he has *actual* notice, so that a prior mortgagor is not chargeable with fraud in releasing portions of his lien, and retaining that portion subsequently sold without actual notice.<sup>3</sup>

The Supreme Court decided, in January 1859, in the case of *Hunter vs. Watson*, that the open, notorious possession of real estate by one having an unrecorded deed for it, is evidence of notice to a subsequent purchaser of the first vendee's title.

<sup>1</sup> *Barker v. Koneman*, April Term, 1859.

<sup>2</sup> 6 Cal. 570.

<sup>3</sup> Wood's Dig. p. 100, *et seq.*



The possession must exist at the time of the acquisition of title or deed of the subsequent vendee from the common vendor.

The forty-first section of the statute of California in reference to recording deeds, requires conveyances made before the passage of the act, that is, prior to April 16, 1850, to be recorded; and the penalty of failing to do so is the same as with conveyances made after the act was passed.<sup>1</sup>

A deed intended to create an estate of joint-tenancy, must clearly express that intent.

The fact that two persons join in a mortgage of lands does not raise a presumption that the estate conveyed is joint property. Joint-tenancies are not favored by our system, the statute having abrogated the common rule of conveyances in this respect, so that in order to constitute a joint estate in lands in two or more persons, such estate must be expressly declared in the conveyance itself, otherwise the estate conveyed will be held by the grantees as tenants in common.<sup>2</sup>

#### OREGON.

*In Oregon*, deeds of lands, or any interest in lands, conveyances, mortgages, powers of attorney to convey lands, and executory contracts for the sale and purchase of lands duly executed, acknowledged or proved, and certified, may be recorded in the county where the lands lie, and read in evidence. And the record thereof, or duly-certified transcript of such record, may be read in evidence, subject to rebutting testimony.

Such deed should be witnessed by two witnesses, may be sealed by a scroll or other device, and should be recorded within sixty days to give notice.

#### WASHINGTON.

*In Washington* a deed is a writing signed and sealed by the party to be bound thereby, witnessed by two witnesses, and acknowledged by the party making it before a judge of the Supreme Court, or of the Probate Court, a justice of the peace or notary public, and must be recorded within six months, to give notice.

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<sup>1</sup> 7 Cal. 479; Wood's Dig. art. 373.

<sup>2</sup> Brown v. May, April Term, 1850; Wood's Dig. art. 380.

## FORMS.

*Simple Form of Deed of Bargain and Sale.*

I, A. B., in consideration of the sum of five hundred dollars to me paid by C. D., do hereby grant, bargain and sell to the said C. D., that lot of land [*here insert location and description*], with all and singular the rights and appurtenances thereof.

Witness my hand and seal, May fifth, 1859. A. B. [L. s.]

Sealed and delivered in presence of  
[*Acknowledgment before the proper officer.*]

*Deed of Bargain and Sale—the Form generally used.*

This indenture, made the first day of July, in the year of our Lord one thousand eight hundred and fifty-nine, between A. B., of \_\_\_\_\_, and M. B., his wife, parties of the first part, and C. D., of \_\_\_\_\_, party of the second part, witnesseth, that the said parties of the first part, for and in consideration of the sum of ten thousand dollars, lawful money of the United States of America, to them in hand paid by the said party of the second part, at or before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged; have granted, bargained, sold, aliened, remised, released, conveyed and confirmed, and by these presents do grant, bargain, sell, alien, remise, release, convey and confirm unto the said party of the second part, and to his heirs and assigns forever, all that certain lot, piece or parcel of land, &c. [*description*], together with all and singular the tenements, hereditaments and appurtenances thereunto belonging, or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof; and also all the estate, right, title, interest, claim of homestead, property, possession, claim and demand whatsoever, as well in law as in equity, of the said parties of the first part, of, in or to the above described premises, and every part and parcel thereof, with the appurtenances. To have and to hold, all and singular the above mentioned and described premises, together with the appurtenances, unto the said party of the second part, his heirs and assigns forever.

In witness whereof, the said parties of the first part have hereunto set their hands and seals, the day and year first above written.

Signed, sealed and delivered, }  
in the presence of L. M. }

A. B. [L. s.]  
M. B. [L. s.]

*Form of Deed by Attorney-in-fact.*

This indenture, made this            day of            , 1859, between A. B., of, &c., party of the first part, and C. D., of, &c., party of the second part, witnesseth, [*proceed as in foregoing forms to the conclusion, and sign it.*] A. B. [L. s.]

By M. N., his attorney-in-fact.

[*Or conclude thus:*] In witness whereof, the said A. B., party of the first part, acting by M. N., his attorney-in-fact, hath here-to set his hand and seal, &c., &c.

*Quit-claim Deed.*

This indenture, made the twentieth day of July, in the year of our Lord one thousand eight hundred and fifty-nine, between A. B.            of            , of the first part, and C. D.            of the second part, witnesseth, that the said party of the first part, for and in consideration of the sum of one thousand dollars, lawful money of the United States of America, to him in hand paid, by the said party of the second part, receipt of which is acknowledged, has remised, released, quit-claimed, and by these presents does hereby remise, release and forever quit-claim unto the said party of the second part, and to his heirs and assigns forever, all that certain lot [*description*], together with all and singular the tenements, hereditaments and appurtenances thereunto belonging, or in anywise appertaining. To have and to hold the same, with all and singular the appurtenances and improvements thereunto belonging, unto the said party of the second part, his heirs and assigns forever.

In witness whereof, &c., [*as in foregoing forms.*]

*Quit-claim, or Transfer of Interest in Property.*

Know, all men, that I, A. B., of &c., &c., do hereby grant, bargain and sell [*or, sell, assign, transfer and set over*], [*or, sell and convey, or, sell and quit-claim, or, remise, release and quit-claim*], unto C. D., of &c., &c., all my right, title and interest in and to all that certain lot or parcel of land situate, lying, and being in &c., [*here insert description, and conclude,*] to have and to hold the same, together with all and singular, &c., [*as in foregoing forms.*]

## COVENANTS TO BE INSERTED IN DEEDS.

*General Warrant.*

And the said A. B. and his heirs, the said premises, in the quiet and peaceable possession of the said party of the second part, his

heirs and assigns, against the said party of the first part, heirs, and against all and every person and persons whomsoever, lawfully claiming or to claim the same, shall and will warrant, and by these presents forever defend.

*Covenant against Acts of Grantor.*

And the said party of the first part, for himself and his heirs, executors and administrators, doth covenant, promise and agree, to and with the said party of the second part, his heirs, executors, administrators and assigns, that he hath not made, done, committed, executed, or suffered, any act or acts, thing or things, whatsoever, whereby, or by means whereof, the above-mentioned and described premises, or any part or parcel thereof, now are, or at any time hereafter shall, or may be, impeached, charged, or incumbered, in any manner or way whatsoever.

*Covenant of Ownership and quiet Possession.*

And the said A. B., for himself and his heirs, doth hereby covenant and agree, that at the delivery hereof he is the lawful owner of the premises above granted, and seized of a good and indefeasible estate of inheritance therein, clear of all incumbrance whatever, of every name or nature; and that he will warrant and defend the above premises, in the quiet and peaceable possession of the said party of the second part, his heirs and assigns, forever.

*Covenants inserted in a full Warrantee Deed.*

To have and to hold the above granted, bargained and described premises, with the appurtenances, unto the said party of the second part, his heirs and assigns, to his and their own proper use, benefit and behoof, forever. And the said A. B., for himself and his heirs, executors and administrators, doth covenant, grant and agree, to and with the said party of the second part, his heirs and assigns, that the said party of the first part, at the time of the sealing and delivery of these presents, is lawfully seized in his own right [*or, as the case may be*], of a good, absolute, and indefeasible estate of inheritance, in fee simple, of and in, all and singular the above granted and described premises, with the appurtenances, and hath good right, full power, and lawful authority, to grant, bargain, sell and convey the same, in manner aforesaid: and that the said party of the second part, his heirs and assigns, shall and may, at all times hereafter, peaceably and quietly have, hold, use, occupy, possess and enjoy, the above granted premises, and every part and parcel thereof, with the appurtenances, without any let, suit, trouble, molestation, eviction, or disturbance, of the said

party of the first part, his heirs or assigns, or of any other person or persons lawfully claiming or to claim the same: and that the same now are free, clear, discharged and unincumbered, of and from all former and other grants, titles, charges, estates, judgments, taxes, assignments and incumbrances, of what nature or kind soever. And, also, that the said party of the first part, and his heirs, and all and every person or persons whomsoever, lawfully or equitably deriving any estate, right, title, or interest, of, in, or to, the herein granted premises, by, from, under, or in trust for, him or them, shall and will, at all time or times, hereafter, upon the reasonable request, and at the proper costs and charges in the law of the said party of the second part, his heirs and assigns, make, do and execute, or cause to be made, done and executed, all and every such further and other lawful and reasonable acts, conveyances and assurances, in the law, for the better and more effectually vesting and confirming the premises hereby granted, or so intended to be, in and to the said party of the second part, his heirs and assigns, forever, as by the said party of the second part, his heirs or assigns, or his or their counsel, learned in the law, shall be reasonably advised, devised, or required: And the said A. B., for himself and his heirs, the above described and hereby granted and released premises, and every part and parcel thereof, with the appurtenances, unto the said party of the second part, his heirs and assigns, against the said party of the first part and his heirs, and against all and every person and persons whomsoever, lawfully claiming, or to claim the same, shall and will warrant, and by these presents forever defend.

In witness, &c.,

*Gift of Personal Estate, by Deed.*

Know all men by these presents: That I, A. B., of &c., in consideration of the natural love and affection which I have and bear for my sister C. B., and also for divers other good causes and considerations, me, the said A. B., hereunto moving, have given, granted and confirmed, and by these presents do give, grant and confirm, unto the said C. B., all and singular my goods, chattels and personal estate, of every name and nature, in whose hands, custody, or possession, soever, they be; [*or, the following goods and chattels, viz., &c.; describing them:*] To have and to hold all and singular the said, &c., &c.

*Deed of Gift of Real Estate.*

This indenture, made, &c., between A. B., of, &c., of the one part, and R. B., son of the said A. B., of the other part, witness-

eth: That the said A. B., as well for and in consideration of the natural love and affection, which he, the said A. B., hath and beareth unto the said R. B., as also for the better maintenance, support and livelihood of him, the said R. B., hath given, granted and confirmed, and by these presents doth give, grant and confirm, unto the said R. B., his heirs and assigns, all, &c., [*description*:] To have and to hold all and singular the premises hereby granted and given, with all and singular, &c., &c.

*Deed of Gift to a Married Woman—Habendum Clause.*

To have and to hold the same to her the said \_\_\_\_\_, her heirs and assigns forever, to and for her and their sole and separate use, benefit and behoof, forever, as her separate property, and free from the management and control of her said husband, the rents, issues and profits to be applied to her sole and separate use.

This conveyance being intended to operate by way of "gift," according to the meaning of that word as first used in the first section of an act entitled "An Act to define the Rights of Husband and Wife," passed on the 17th day of April, 1850, by the legislature of the state of California, and to be followed by the legal effects therein given to acquisitions by a married woman of property by "gift," to wit: That such acquisition shall be her separate property, and not the common property of the husband and wife, and it being also intended to secure to the said the rents, issues and profits of the said premises above described to her sole and separate use, in accordance with the provisions of the said act as amended by the act of \_\_\_\_\_, 1853.

In witness whereof, &c.

*Concluding part of Trust Deed for Benefit of Wife.*

To have and to hold all and singular, the said hereinbefore granted and described premises unto the said E. F., his heirs and assigns, upon the trusts nevertheless, and to and for the uses, interests and purposes hereinafter limited, described and declared. *That is to say*, upon trust for H. B., wife of A. B., as her sole, exclusive, separate and only use and benefit, exclusive of any and all rights, title, interest, power and claim of her said husband, A. B., one of the parties of the first part to these presents, therein, and for all liability for the payment of any of his debts, or on account of any of his acts, or on his account by reason of their said marriage relation or otherwise.

And upon this further trust, that the said E. F., his heirs and assigns, shall take possession of said premises and receive the

issues, rents and profits of the said premises, and apply the same to the use of the said H. B., during the term of her natural life, and that her sole and separate receipt therefor, shall be an acquittance, and after the death of the said H. B., convey the same to the heirs of the said H. B. in fee. And upon this further trust, that he the said E. F., his executors and administrators, shall and may, in his and their discretion, sell, dispose of, vest and re-invest said real estate and income thereof.

And that the said party of the second part, and his heirs and assigns, shall and may at all times hereafter peacefully and quietly have, hold, use, occupy, possess and enjoy the above granted, bargained and described premises, and every part and parcel thereof, with the appurtenances, and receive and take the rents, issues and profits thereof to and for his and their own proper use and benefit, without any loss, suit, hindrance or molestation, eviction or denial of, from or by the said parties of the first part, their heirs and assigns, or of, from or by any other person whomsoever, lawfully claiming or to claim any estate, right, title or interest of, in or to the same, by, through or under them or either of them.

In witness whereof the parties to these presents have hereunto interchangeably set their hands and seals, &c.

*Another Form.*

To have and to hold all and singular the above-mentioned and described premises, together with the appurtenances unto the said party of the second part, his heirs, and successors forever.

In trust, nevertheless, for the sole and separate benefit and behoof of the said \_\_\_\_\_, wife of, &c., her heirs and assigns forever, free from the control or disposition, debts and liabilities of her said husband, and to permit and suffer her, the said \_\_\_\_\_, to take, collect, and receive the rents, issues, and profits thereof, to and for her sole and separate use, free from the control or disposition, and from the debts and liabilities of her said husband, with full and absolute power to the said \_\_\_\_\_ of incumbering, disposing of, and alienating said premises above described, or any part thereof, together with the rents, issues, and profits thereof, by deed, or by last will and testament, or otherwise, as if she were sole and unmarried, so far as she may by the laws of the statute of California.

In witness whereof, &c.

*Deed of Release of Property from Attachment.*

For and in consideration of the sum of                      dollars to me in hand paid by A. and B., I do hereby grant, remise, release, and forever discharge the following described lands and premises, to wit:

together with all and singular the tenements, hereditaments and appurtenances thereunto belonging or appertaining, and the rents, issues, and profits thereof, from all claim to or interest in the same, or any part thereof, which I may have under and by virtue of a certain writ of attachment issued out of the district court of the                      judicial district, in an action pending in said court, between me, as plaintiff, and the said A. and B., as defendants, and tested on the                      day of                      , in the year 1859, and from all lien or incumbrance that has attached to the same by reason of the issuing or levy of said writ of attachment, as free and clear in all respects as though said writ of attachment had not been issued or levied; and also from any and all claim to or interest in the premises, by reason of any other matter or thing soever.

In witness whereof, I have hereunto, and to a duplicate hereof, set my hand and seal, this                      day of                      , A. D. 1859.

Sealed and delivered in } [L. s.]  
presence of }

*Deed of Confirmation on Coming of Age.*

This indenture, made, &c., between A. B., of, &c., of the first part, and C. D., of, &c., of the second part: Whereas, by a certain deed of bargain and sale, bearing date on or about the, &c., and made between C. B. and A. B., of the one part, and the said C. D. of the other part, for the consideration of                      dollars, the premises therein mentioned and hereinafter intended to be released and confirmed, are thereby granted and conveyed, or intended so to be, unto and to the use of the said C. D., his heirs and assigns, forever; as by the said indenture of bargain and sale, relation being thereunto had, may more fully appear. And whereas, the said A. B., at the time of the date and making the said in part recited indenture of bargain and sale, was not of the age of twenty-one years, but hath since attained to such age, and hath this day, and before the execution of these presents, duly sealed and delivered the said in part recited indenture of bargain and sale: Now this indenture witnesseth: that, as well in the performance of a covenant for further assurance in the said indenture of bargain and sale contained, as also for and in consideration of the sum of                      dollars, to him, the said A. B., in hand paid by the said C. D., the receipt whereof the said A. B. doth hereby acknowledge, he, the said A. B., hath



remised, released, aliened and quit-claimed, and by these presents doth absolutely remise, release, alien and forever quit-claim and confirm, unto the said C. D., in his actual possession now being, by virtue of the before-mentioned indenture of bargain and sale, and to his heirs and assigns, all [*description.*] To have and to hold the above-mentioned premises to the use of the said C. D., his heirs and assigns, forever. [*Insert such covenants as may be necessary.*]

In witness, &c.

*Same by Endorsement.*

Be it known, that the within indenture was executed by A. B. therein named, while under the age of twenty-one years, who has now attained his full age of twenty-one years; and that the said A. B. has, on this       day of       , sealed and delivered this present indenture as his own act and deed.

In witness whereof, the said A. B. has hereunto set his hand and seal, the day and year above written.

Sealed, &c.

*Deed of Confirmation—Concluding Part.*

The premises hereby conveyed being the same which were heretofore conveyed or intended to be conveyed, by said party of the first part, one A. B., on and bearing date the 14th day of December, A. D. 1859, and recorded in the county recorder's office of the county of San Francisco, in Liber 1 of Deeds, at page 100, December 14th, 1859. The title and interest of said A. B. in said premises having since that time become vested in the said party of the second part—this deed being executed by way of confirmation of the said deed so executed to the said A. B., and for the purpose of vesting the title to such premises in his grantee thereof.

In witness whereof, the said party of the first part hath hereunto set his hand and seal, the day and year first above written.

Sealed and delivered in the presence of

*Corporation Deed.*

This indenture, made the       day of       , in the year one thousand eight hundred and       , between the Moke-lumne Mining Canal Company [*or, the California Insurance Company*], of the first part, and C. D., of, &c., [*as in foregoing forms, and conclude.*] To have and to hold the above granted, bargained and described premises, with the appurtenances, unto the

*Deed of Release of Property from Attachment.*

For and in consideration of the sum of                      dollars to me in hand paid by A. and B., I do hereby grant, remise, release, and forever discharge the following described lands and premises, to wit:

together with all and singular the tenements, hereditaments and appurtenances thereunto belonging or appertaining, and the rents, issues, and profits thereof, from all claim to or interest in the same, or any part thereof, which I may have under and by virtue of a certain writ of attachment issued out of the district court of the                      judicial district, in an action pending in said court, between me, as plaintiff, and the said A. and B., as defendants, and tested on the                      day of                      , in the year 1859, and from all lien or incumbrance that has attached to the same by reason of the issuing or levy of said writ of attachment, as free and clear in all respects as though said writ of attachment had not been issued or levied; and also from any and all claim to or interest in the premises, by reason of any other matter or thing soever.

In witness whereof, I have hereunto, and to a duplicate hereof, set my hand and seal, this                      day of                      , A. D. 1859.

Sealed and delivered in                      [L. S.]  
presence of                      }

*Deed of Confirmation on Coming of Age.*

This indenture, made, &c., between A. B., of, &c., of the first part, and C. D., of, &c., of the second part: Whereas, by a certain deed of bargain and sale, bearing date on or about the, &c., and made between C. B. and A. B., of the one part, and the said C. D. of the other part, for the consideration of

dollars, the premises therein mentioned and hereinafter intended to be released and confirmed, are thereby granted and conveyed, or intended so to be, unto and to the use of the said C. D., his heirs and assigns, forever; as by the said indenture of bargain and sale, relation being thereunto had, may more fully appear. And whereas, the said A. B., at the time of the date and making the said in part recited indenture of bargain and sale, was not of the age of twenty-one years, but hath since attained to such age, and hath this day, and before the execution of these presents, duly sealed and delivered the said in part recited indenture of bargain and sale: Now this indenture witnesseth: that, as well in the performance of a covenant for further assurance in the said indenture of bargain and sale contained, as also for and in consideration of the sum of                      dollars, to him, the said A. B., in hand paid by the said C. D., the receipt whereof the said A. B. doth hereby acknowledge, he, the said A. B., hath

remised, released, aliened and quit-claimed, and by these presents doth absolutely remise, release, alien and forever quit-claim and confirm, unto the said C. D., in his actual possession now being, by virtue of the before-mentioned indenture of bargain and sale, and to his heirs and assigns, all [*description :*] To have and to hold the above-mentioned premises to the use of the said C. D., his heirs and assigns, forever. [*Insert such covenants as may be necessary.*]

In witness, &c.

*Same by Endorsement.*

Be it known, that the within indenture was executed by A. B. therein named, while under the age of twenty-one years, who has now attained his full age of twenty-one years; and that the said A. B. has, on this       day of       , sealed and delivered this present indenture as his own act and deed.

In witness whereof, the said A. B. has hereunto set his hand and seal, the day and year above written.

Sealed, &c.

*Deed of Confirmation—Concluding Part.*

The premises hereby conveyed being the same which were heretofore conveyed or intended to be conveyed, by said party of the first part, one A. B., on and bearing date the 14th day of December, A. D. 1859, and recorded in the county recorder's office of the county of San Francisco, in Liber 1 of Deeds, at page 100, December 14th, 1859. The title and interest of said A. B. in said premises having since that time become vested in the said party of the second part—this deed being executed by way of confirmation of the said deed so executed to the said A. B., and for the purpose of vesting the title to such premises in his grantee thereof.

In witness whereof, the said party of the first part hath hereunto set his hand and seal, the day and year first above written.

Sealed and delivered in the presence of

*Corporation Deed.*

This indenture, made the       day of       , in the year one thousand eight hundred and       , between the Moke-lumne Mining Canal Company [*or, the California Insurance Company*], of the first part, and C. D., of, &c., [*as in foregoing forms, and conclude :*] To have and to hold the above granted, bargained and described premises, with the appurtenances, unto the

said party of the second part, his heirs and assigns, to his and their own proper use and benefit, forever.

In witness whereof, the said party of the first part hath hereunto caused their corporate seal to be affixed, and these presents to be subscribed by their president [*or, secretary, or, as the case may be*].

Sealed and delivered, in }  
presence of M. N. }

B. C. [L. s.]  
President of the Company.

### *Deed of Exchange of Lands.*

This indenture, made, &c., between A. B., of, &c., of the first part, and C. D., of, &c., of the second part, witnesseth: That the said A. B., in consideration of the conveyance hereinafter made to him by the said C. D., of lands of the value of at least one thousand dollars, and of the sum of five hundred dollars in cash, money in hand paid, to said A. B. by said C. D., hath given and granted, and by these presents doth give and grant, unto the said C. D., his heirs and assigns, all [*description*], with all and every of the appurtenances, said lands being of the value of at least one thousand five hundred dollars, in exchange of and for the lands hereinafter mentioned, of the said C. D., and for the additional consideration of money as above expressed: To have and to hold the said premises, with the appurtenances, to the said C. D., his heirs and assigns, forever. And the said A. B. doth covenant, &c. [*Insert such covenants as may be necessary.*] And the said C. D. hath likewise, on his part, given and granted, and by these presents doth give and grant, unto the said A. B., his heirs and assigns, all [*description*], with all and every of the appurtenances, said lands being of the value of at least two thousand dollars, in exchange of and for the premises first above described: To have and to hold the above granted premises, with the appurtenances, to the said A. B., his heirs and assigns, forever, as aforesaid. And the said C. D. doth covenant, &c. [*as above*].

In witness whereof, the said parties have hereunto set their hands and seals, &c.

### *Deed of Partition.*

This indenture made, &c., between A. B., of, &c., of the one part, and C. D., of the other part, witnesseth: That, whereas, they the said A. B. and C. D., do have and hold in common, and as tenants in common, in equal parts, all, &c, it is covenanted, granted, concluded, and agreed, by and between the said parties; and each of them, covenants, grants, concludes and agrees, for himself, his heirs and assigns, that a partition of the said lands

and other premises be made in manner and form following, that is to say :

*First.* The said A. B. shall, from henceforth, have, hold, possess, and enjoy, in severalty by himself, and to him, and his heirs and assigns, for his half part, property, share and proportion of the said lands and premises, all, &c. Together with all and singular, the hereditaments and appurtenances thereunto belonging, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof.

And the said C. D., doth accordingly give, grant, release, and confirm unto the said A. B., his heirs and assigns, the lands and premises so as aforesaid set apart to the said A. B., as and for his part and share aforesaid ; and, moreover, the said C. D., for himself, his heirs, executors and administrators, doth hereby covenant to and with the said A. B., his heirs and assigns, that he, the said A. B., his heirs and assigns, shall, and may from time to time, and at all times hereafter, well and peaceably have, hold, and possess, and enjoy the lands and premises herein before assigned and conveyed to the said A. B., for his part and share, as aforesaid ; free, clear, and discharged of and from all estate, rights, titles, interests, charges and encumbrances, whatsoever, had, made, caused, or suffered to be made, caused, or suffered, of or by the said C. D., or any person claiming or to claim, by, from or under him, and without any let, trouble, suit, entry, disturbance, or interruption of the said C. D., his heirs, or assigns, or of any person or persons lawfully claiming, or to claim, by, from, or under him, them, or any of them.

*Second.* The said C. D. shall, from henceforth, have, hold, possess, and enjoy, in severalty by himself, &c. [*proceed to set his share as above, and add the covenants*].

In witness, &c.

For other forms of deeds, tax deeds, sheriff's deed, executor's deed, &c., &c., see the forms under those titles respectively.

## CHAPTER XVII.

## ESTRAYS, LAWFUL FENCES AND ANIMALS TRESPASSING UPON PROPERTY.

## ESTRAYS.

IN referring to the subjoined statute of 1856, and the amendments of the act of 1859, care must be taken to observe to which counties the original act applies, to which the act as amended applies, and which counties are exempt from the application of either statute.

The following is the statute concerning estrays, as applicable to the counties of *Trinity*, *Tuolumne*, *Sacramento*, and *Santa Clara*:<sup>1</sup>

SECTION 1. Every citizen, resident householder, in any county in this state, on finding any estray horse, mare, mule, jack or jenny, or any neat cattle, or any number of such animals, upon his farm or premises, who shall desire to take up the same, shall, at any time after the expiration of twenty days from the finding the same, if such animal or animals remain on his farm or premises, go before some justice of the peace of his township, or if there be no acting justice therein, then before some justice of a neighboring township, and make oath that he has made diligent inquiry throughout his neighborhood to ascertain the ownership of such estrays, and that he has also put up ten days previously, a written notice, in one or more of the most public places in his township, naming the place or places, setting forth all the information in his possession concerning the said animals, embracing a description of the marks and brands thereof, and that he was about to post the same. He shall also, at the same time, make oath that the marks and brands of said animals have not been altered since they came to his farm or premises, and that the owner or owners are unknown to him.

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<sup>1</sup> Wood's Dig. art. 2386-2398; Laws 1856, p. 149.

SEC. 2. At the time the taker up appears before the justice, as aforesaid, the justice shall appoint two disinterested appraisers, who are resident householders of the county, to appraise and describe such animal or animals.

SEC. 3. The appraisers so appointed, if they are not already able to describe and appraise such estray, shall, as soon as practicable, proceed to view the same, and make out a detailed description thereof, stating the marks, brands, supposed age, color, stature, and value of each animal, which description and valuation shall be signed by the appraisers, and sworn to before the justice appointing them.

SEC. 4. It shall be the duty of said justice immediately to record in a book, to be by him kept for that purpose, a statement of the taking up, as aforesaid, together with a description, as sworn to by the appraisers, and their appraisalment.

SEC. 5. The justice shall, within twenty days, if the estrays have not previously been claimed and proven by the true owner, make out and transmit a certified copy of the entry in his estray book, as aforesaid, to the county recorder of the county, which shall immediately be by him recorded in a book to be kept for that purpose. Said record, and also the justice's book, to be, at all proper times, subject to examination, by all persons making application, without charge or fee.

SEC. 6. If the owner of any estray animal, posted as aforesaid, shall, within one year from the time the same was posted, appear and claim the same, he shall notify the taker up thereof, and the owner shall establish his claim to such animals, before some justice of the peace of the proper township, by such evidence as shall be satisfactory to the justice. In all cases, when the claimant shall make satisfactory proof of ownership, the justices shall make an order that he have restitution of the animal so proven, upon his paying the costs, and to the taker up, the expenses and costs that may be awarded him by the justice; *provided*, the justice shall not allow any expenses for keeping an estray which the taker up, or any one under his authority, may have worked, ridden, or used while in his possession.

SEC. 7. If the owner of any lost or stray animal shall not appear and prove his property therein, within one year after the same is posted, he shall forfeit his right thereto, and the property

in such animal shall be vested in the taker up, upon his paying into the county treasury the one-half appraised value thereof, as fixed by the appraisers, as aforesaid.

SEC. 8. No person taking up any animal under this act shall sell, exchange, or dispose of the same in any manner, or remove the same from the county in which it was posted, until after the expiration of one year from the posting, and until he shall have paid the one-half appraised value into the county treasury.

SEC. 9. If any estray animal die, or escape from the possession of the taker up, at any time before the expiration of one year from the taking up, he shall not be held liable, in any manner, on account of such animal.

SEC. 10. In all cases where money has been paid into the county treasury, pursuant to the seventh section of this act, the same shall be kept in separate account by the treasurer, and safely held in trust for the space of six months after it is so paid in, to be paid over to the true owner of the estray, upon such owner, within the said time, producing to the treasurer the certificate of the proper justice, setting forth that said owner had made satisfactory proof of ownership within the six months, as aforesaid, by a like proceeding as provided for in the sixth section of this act, the treasurer retaining out of said money his own percentage.

SEC. 11. All moneys paid into the county treasury under the provisions of this act, if not legally withdrawn, as above provided, shall become a part, and belong to the county school fund, and be drawn from the county treasury on the warrant of the county superintendent, and shall be exclusively appropriated to the county school fund, and for no other purpose.

SEC. 12. The owner of any estray animal which has been legally taken up, or for the taking up of which proceedings have been commenced under this act, knowing the same to have been posted, shall not be permitted to take, lead, or drive the same from the premises or possession of the person legally possessed thereof, until proven and the charges paid; and any person, knowingly and wilfully violating the provisions of this section, shall be subject to all the penalties that he would be subject to under the statute law; *provided*, he had no claim to said animal.

SEC. 13. If any person shall take into use, or in any manner dispose of, any lost or estray animal, which may be found upon



his farm or premises, or exercise any control over any such animal, except in case said animal has broken into his lawful enclosure, without having first posted the same, or having proceeded to post any such animal, shall use, or in any manner dispose of the same, contrary to and in violation of the provisions of this act, he shall be deemed guilty of larceny, and punished accordingly.

SEC. 14. If, at the expiration of one year from the taking up of any estray under this act, the justice before whom the same was posted, his successor in office, or the district attorney of the county, has good reasons to believe the taker up has not duly paid into the county treasury the one-half appraised value, as herein required, it is hereby made the special duty of said justice in whose custody the record of the estray remains, or the district attorney, to issue a notice to the delinquent requesting him to appear before the justice on a day specified, and show cause, if any he can, why judgment shall not be entered against him in favor of the county, for the sum. Such notice may be delivered to the sheriff of the county or any constable of the proper township, and by him served on the party.

SEC. 15. If no sufficient cause is shown, the justice shall enter judgment against the delinquent, for the amount due the county, with costs, which judgment shall be a lien upon all the property real and personal, belonging to the delinquent, from the time the same is entered.

SEC. 16. In all cases wherein any services are performed by any officer or officers, under this act, their fees shall be allowed as follows, viz.: To the justice, for all services connected with the posting the animal or animals, which shall include the transcript for the recorder, two dollars. To the county recorder, for recording the transcript, one dollar. For all services performed by the justice under this act, other than the above, and for all services performed by other officers, the same fees as are allowed to civil officers in similar cases.

SEC. 17. Nothing in this act shall be construed so as to apply to the counties of San Diego, Santa Barbara, San Bernardino, Los Angeles, Monterey and San Luis Obispo.

The foregoing act of 1856, as to sections 2, 3, 4, 5, 6, 10, 11, 12, 13, 15 and 16, and the other sections as amended and added to, by the act of 1859, apply to all the counties except those men-

tioned in the commencement of this chapter, and those named in section 16 of the act of 1856.

The act of 1859 is as follows :

SECTION 1. Section one of an act entitled "An Act concerning Estray Animals," passed April nineteenth, eighteen hundred and fifty-six, is hereby amended so as to read as follows: Section one. Every citizen, resident householder, in any county in this state, on finding any estray horse, mare, mule, jack or jenny, or any neat cattle, sheep, or goats, or any number of such animals, upon his farm or premises, who shall desire to take up the same, shall, at any time after the expiration of twenty days, from the finding of the same, go before some justice of the peace in his township, or, if there be no acting justice therein, then before some justice of a neighboring township, and make oath that he has made diligent inquiry through his neighborhood to ascertain the ownership of such estrays, and that he has also put up, ten days previously, a written notice in one or more of the most public places in his township, naming the place or places, setting forth all the information in his possession, concerning the said animals, embracing a description of the marks and brands thereof, and that he has examined the county records of marks and brands of such animal or animals upon record, and that he was about to post the same. He shall also, at the same time, make oath that the marks and brands of said animal have not been altered since they came to his farm or premises, and that the owner or owners are unknown to him.

SEC. 2. Section seven of the act aforesaid is hereby amended so as to read as follows: Section seven. If the owner of any lost or strayed animal shall not appear and prove his property therein within one year after the same is posted, he shall forfeit his right thereto. When the appraised value of any stray or strays of the same species, taken up as aforesaid, does not exceed one hundred dollars, the taker up shall apply to the justice of the peace to whom the return was made, or to his successor, for a copy of such return, appraisement, with marks and brands, and supposed age; and the taker up shall forthwith deliver the same to a constable of the township, if there be any such, and if not, then to a constable of a neighboring township, and the constable shall immediately advertise such stray or strays for sale, at three public

places within the township, mentioning the time and place of sale, which shall be at least twenty days from the time of advertising, and the sale shall be made at some public place in the township, if of a horse kind, but, if any other kind, it shall be at the residence of the taker up, at which time the taker up shall deliver to the constable such stray or strays, and their increase, if any there be, and take his receipt therefor, and transmit the same to the said justice of the peace. The constable shall proceed to sell the same to the highest bidder, and pay the proceeds of such sale to said justice of the peace. When the appraised value exceeds one hundred dollars, the taker up shall deliver said copy of marks and brands to the sheriff of the county in which such stray or strays were taken up, who shall advertise them in one public newspaper, if there be any published in said county, for the term of thirty days, and if not, he shall advertise by written notice, posted in three or more public places, stating the time and place of sale, at which time and place the taker up shall deliver such stray or strays, and their increase, if any there be; the sheriff shall proceed to sell the same to the highest bidder, and after paying the amount awarded to the taker up by said justice, and for publishing, he shall pay into the county treasury the residue, reserving six per cent. for his fees, and take the treasurer's receipt for the same, and transmit it, together with the transcript of the marks and brands of the said stray or strays to the county recorder.

SEC. 3. Section eight of said act is hereby amended so as to read as follows: Section eight. No person taking up any animal under this act shall sell or dispose of the same in any manner, or remove the same from the county in which it was posted. Any person so offending shall be deemed guilty of larceny, and punished accordingly.

SEC. 4. Section nine of said act is hereby amended so as to read as follows: Section nine. If any stray animal dies or escapes from the possession of the taker up, at any time before the expiration of one year from the taking up, he shall not be held liable in any manner on account of such animal; *provided* the death of such animal be not caused by maltreatment, or the escape of such animal be not caused by neglect on the part of the taker up.

Sec. 5. Section fourteen of said act is hereby amended so as to read as follows: Section fourteen. It shall be the duty of the Recorder, upon the receipt of said transcript, to make an entry upon the record, showing that such animal or animals have been sold; or upon receipt of notice from the justice that such animals have been proven by the owner, he shall make an entry of the same. It shall also be his duty to cause a list of all estrays, with a description thereof, to be posted at the door of the court-house on the first day of the court next holden after such returns have been made to his office. He shall make out a list of those who have not complied with the provisions of this act, and transmit the same to the district attorney, who shall issue a notice to the delinquent, requesting him to appear before the justice on a day specified, and show cause, if any he can, why judgment should not be entered against him in favor of the county for the sum of appraisement and costs. Such notice may be delivered to the sheriff of the county, or any constable of the proper township, and by him served upon the party.

Sec. 6. Section sixteen of said act is hereby amended so as to read as follows: Section sixteen. In all cases where any services are performed by any officer or officers under this act, their fees shall be allowed as follows: To the justice, for all services connected with the posting of the animal or animals, which shall include the transcript of the recorder, two dollars; the county recorder, for recording transcript and all other services, two dollars; which fees shall be paid by the taker up. Said taker up shall be allowed five dollars for taking up such animal or animals taken up at the same time, and one dollar per head, per month, for the keeping of the same, provided the same be cattle; and two dollars, provided the same be of horse kind; and twenty-five cents, provided the same be sheep or goats.

Sec. 7. It shall be the duty of the justice of the peace, upon the receipt of the money proceeding from the sale of such stray or strays, to award to the taker up the amount as provided for in this act, and pay the same. Also five per cent. of said proceeds to the constable, and pay the residue to the county treasurer, taking his receipt for the same, and transmit it to the county recorder, together with the transcript of marks and brands of the said animal or animals. When the owner of such animal or

animals shall appear and prove the same, it shall be the duty of the justice of the peace to transmit a notice of the same to the county recorder.

Sec. 8. Whenever the brand or mark of any animal, claimed to be an estray under the provisions of this act, is recorded in the office of the county recorder of the county in which such animal may be, it shall be the duty of any person, upon whose premises such animal may be, to give the owner of such brand, or earmark so recorded, twenty days' notice of the fact that such animal is claimed by him to be an estray. It shall be unlawful for any person to post or take up an animal as an estray under the provisions of this act, the brands and earmarks of which are so recorded, until after such notice has been given.

Sec. 9. The provisions of this act shall not apply to the counties of Trinity, Tuolumne, Sacramento and Santa Clara.

Every auctioneer, who shall sell any animal of the horse kind, or any mules, is required to keep a book, in which he shall register the name of each and every person bringing, or offering, any horse or mule to be sold, and the name of the person purchasing such horse, or mule, together with the date of such sale, or sales, and a description of each horse, or mule, so sold, together with the marks and brands—said book to be a public record, open to the inspection of any person.<sup>1</sup>

#### LAWFUL FENCES.

What shall be lawful fences for the counties of *Butte, Amador, Tuolumne, Calaveras, San Diego, Nevada, Santa Barbara, Yuba, Trinity, Klamath,* and *Siskiyou*, is declared by the Statute of 1850 as follows:<sup>2</sup>—

Every enclosure shall be deemed a lawful fence, which is four and a half feet high, if made of stone; and if made of rails, five and a half feet high; if made upon the embankment of a ditch, three feet high from the bottom of the ditch, the fence shall be two feet high; said fence to be substantial and reasonably strong, and made so close that stock cannot get their heads through it, and if made to turn small stock, sufficiently tight to keep such

<sup>1</sup> Laws of 1850, p. 354.

<sup>2</sup> Wood's Dig. art. 2470.

stock out. A hedge fence shall be considered a lawful fence if five feet high and sufficiently close to turn stock.<sup>1</sup>

In the counties of *Sonoma*, *Napa*, and *El Dorado*, the following described shall be a lawful fence, viz. : 1. Post-and-rail fence shall be made of post not less than four by six inches, set in the ground not less than two feet, with rails not less than three inches thick, placed not more than five inches apart, for the first three feet, and after that not more than eight inches apart, the fence to be not less than five feet high. 2. Worm fence shall be five feet high, with additional stakes and riders, no greater space to intervene between the rails than in a post and rail fence. 3. Post and slat fence shall be of the same height and with the same space between the slats as above, in this section, the post shall not be less than twelve inches in circumference, and not less than two feet in the ground, the slats to be not less than one and a half inches thick, all well fastened to the post with twelve-penny nails. 4. Paling fence shall be of the same height, and the post of the same size, and set in the ground the same depth, as in a post-and-rail fence, with posts not more than ten feet apart. 5. Ditch fence shall be four feet wide at the top, and three feet deep, with post set in the embankment not over seven feet apart, with three slats not less than four inches wide, and one and a half inches thick, all securely fastened to the post; or,<sup>2</sup>

Any fence which, by reliable evidence, shall be declared as strong, substantial, and as well calculated to protect enclosures as either of those described in the third section of this act, shall be a lawful fence in each of the counties named in the second section of this act.<sup>3</sup>

Lawful fences in the county of *Contra Costa*, are declared to be as follows :—

A fence constructed with posts of reasonable size and strength, firmly set in the ground, not more than twelve feet apart if a rail or picket fence, and not more than eight feet if a plank fence, the rails or plank of reasonable size and strength, securely fastened to the posts to the height of four and a half feet, and reasonably close; if a picket fence, the pickets of ordinary size and strength, strongly nailed to a rail above and one below, or driven into the

<sup>1</sup> Wood's Dig. art. 2478.

<sup>2</sup> Laws 1856, p. 123; Wood's Dig. art. 2478.

ground and nailed to a rail above, reasonably close, and four and a half feet high; if a ditch fence, the ditch to be three and a half feet wide at the top, and three feet deep, the embankment to be on the inside of the enclosure, with a rail, plank, or picket fence on the embankment, to the height of three feet; or any other kind of fence equivalent in height, quality and strength to the above kinds of fences, are hereby declared lawful fences in said county.<sup>1</sup>

Any horses, mules, jacks, jennies, cattle, sheep, goats, or hogs, breaking down, through, or over a fence lawful by this act, the owner of such animal or animals shall be liable for the damages done, and shall pay double damages for any subsequent trespass by such animal or animals.<sup>1</sup>

What shall be lawful fences in the counties of *San Bernardino, Colusa, Shasta, Tehama* and *Placer*, are defined as follows, by the act of 1859 :—

SECTION 1. In the counties of San Bernardino, Colusa, Shasta, Tehama and Placer, every enclosure shall be deemed a lawful fence which is four and one-half feet high, if made of stone, and if it be made of rails, five and one-half feet high; if the fence be a post-and-rail fence, or a picket fence, it shall be constructed of posts of reasonable size and strength, firmly set in the ground, not more than twelve feet apart, and not more than eight feet apart if it be a board fence; the rails, boards, or pickets to be of reasonable size and strength, securely fastened to the posts, to the height of four and a half feet, and reasonably close; if a picket fence, the pickets also to be strongly nailed to a rail above and one below, or driven into the ground and nailed to a rail above reasonably close; if a ditch fence, the ditch to be at least two and a half feet deep, and three feet wide at the top, the embankment to be either on the inside or outside of the enclosure, with a rail, board or picket fence on the embankment to the height of three feet, or any other kind of fence equivalent in height, quantity and strength to the above kind of fences, are hereby declared lawful fences in said counties.

SEC. 2. If any horse, mule, jack, jenny, hog, sheep, goat, or any head of neat cattle, shall break into any ground, enclosed by a

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<sup>1</sup> Laws 1858, p. 40.

lawful fence, the owner or manager of such animal shall be liable, to the owner of such enclosed premises, for all damages sustained by such trespass; and if the trespass be repeated, by neglect of the owner, or manager, of such animals, he shall, for the second and every subsequent trespass, be subject to double the damages of such trespass, to the owner of the premises, *provided, also*, that the owner of any premises, enclosed by a lawful fence, may take up, and safely keep, at the expense of the owner thereof, any such animal, or animals, trespassing thereon, and if such animal or animals shall not be applied for by the owner thereof, and such damages be paid, within ten days after such taking up, the same may be posted and disposed of, under the estray law of the state; and, before restitution shall be had by the owner of such animal, or animals, in any case, all damages done by them, and all expense of pasturing, keeping, and disposing, shall be paid.

SEC. 3. When a fence shall have been erected by any person, on the line of his land, or that for which he may have a lease for one year, or more, and the person owning the land adjoining thereto, or holding a lease of the same for one year or more years, shall make, or cause to be made, an enclosure on the opposite side of such fence, so that such fence may answer the purpose of enclosing his ground, also, such person shall pay the owner of such fence, already erected, one half of the value of so much thereof as serves as a partition fence between them.

SEC. 4. When two or more persons own land adjoining, which is enclosed by one fence, and it becomes necessary, for the protection of the right and interest of one party, that a partition fence should be made between them, the other, or others, when notified of the fact, shall proceed to erect, or cause to be erected, one-half of such partition fence, such fence to be erected on (or as near as possible) the division line of such land; and if, after notice is given by either party, and a reasonable time has elapsed, and the other party persist in refusing to erect one-half of such fence, the party giving such notice may proceed to erect the entire partition fence, and collect, by law, the proportional share of the cost of such fence, from the party, or parties, so refusing to build his or their respective portions thereof.

SEC. 5. All partition fences, separating adjoining enclosures



shall stand upon the line, and any person, or persons, when erecting a partition fence, and refusing to place it on the line dividing such lands, or remove it to such line, when erected otherwise than thereon, shall subject himself to one-half the cost of the removal, and erection thereof in the right place.

Sec. 6. The respective owners, or lessees, of lands which now are, or hereafter may be, enclosed with fences, and their successors in interest therein, shall keep up, and maintain, in good repair and condition, all partition fences, between their own and the next adjoining enclosures, in equal shares.

Sec. 7. When two or more persons shall agree to cultivate lands, under one enclosure, neither of them shall place, or cause to be placed, any stock or animals on his, her, or their ground, to the injury or damage of the other, or others, but, for a violation of this provision, shall be liable for all damages thus sustained by the other, or others, and for a repetition of such violation, after due notice be given, and for every subsequent repetition, double damages shall be recovered; it shall not be necessary to prove an express agreement to cultivate under one enclosure, but the fact of such cultivation shall be sufficient evidence of such agreement.

Sec. 8. All acts or parts of acts inconsistent with the provisions of this act are hereby repealed, so far as they relate to the counties of San Bernardino, Colusa, Shasta, Tehama, and Placer.

What shall be lawful fences in counties other than those already mentioned, are as follows:

1. Wire fences shall be made of post not less than twelve inches in circumference, set in the ground not less than eighteen inches, and not more than eight feet apart, with not less than three horizontal wires, each one-fourth of an inch in diameter—the first one shall be eighteen inches from the ground, the other two above this one, at intervals of one foot between each, all well stretched and securely fastened from one post to another, with one rail, slat, pole or plank, of suitable size and strength, securely fastened to the post not less than four and a half feet from the ground. 2. Post-and-rail fence shall be made of post of the same size and at the same distance apart, and the same depth in the ground as above, with three rails, slats or planks,

of suitable size and strength, the top one to be four feet and a half from the ground, the other two at equal distances between the first and the ground, all securely fastened to the post. 3. Picket fence shall be the same height as above, made of pickets, each not less than six inches in circumference, not more than six inches apart, driven in the ground not less than ten inches, all well secured at the top by slats or caps. 4. Ditch and pole fence shall be made of a ditch not less than four feet wide on top, and three feet deep, embankment thrown upon the inside of the ditch, with substantial posts set in the embankment not more than eight feet apart, and a plank, pole, rail or slat securely fastened to said posts, at least five feet high from the bottom of the ditch. 5. Pole fence shall be four and a half feet high, with stakes not less than three inches in diameter, set in the ground not less than eighteen inches, and where the stakes are placed seven feet apart, there shall be not less than six horizontal poles well secured to the stakes; if the stakes are six feet apart, five poles; if three or four feet, four poles; if two feet apart, three poles, and the stakes need not be less than two inches in diameter; if one foot apart, one pole, and stakes need not be more than two inches in diameter. The above is a lawful fence so long as the stakes and poles are securely fastened and in a fair state of preservation. Hedge fence shall be considered lawful when, by reliable evidence, it shall be proved equal in strength and as well suited to the protection of enclosed lands as any one of the fences described in other subdivisions of this section. 6. Brush fence shall be four and a half feet high, and at least twelve inches wide, with stakes not less than two inches in diameter, set in the ground not less than eighteen inches, one on each side, every third foot tied together at the top, with one horizontal pole tied to the outside stake five feet from the ground.<sup>1</sup>

Any fence which, by reliable evidence, shall be declared as strong, substantial and as well suited to the protection of enclosures as either of the above described, shall be a lawful fence in all the counties of this state, except Sonoma, Napa, and El Dorado.<sup>1</sup>

The following provisions of the statute of 1855, in relation to

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<sup>1</sup> Wood's Dig. art. 2475. 2477; Laws 1855, p. 128.

partition fences, apply to all the counties of the state, *except* San Bernardino, Colusa, Shasta, Tehama and Placer, and those mentioned above in the first paragraph of this division, concerning lawful fences:¹

SEC. 5. When a fence shall hereafter be erected by any person on the line of his land, or that for which he may have a lease for one or more years, and the person owning the land adjoining thereto, or holding a lease on the same for one or more years, shall make or cause to be made, an enclosure on the opposite side of such fence, so that such fence may answer the purpose of enclosing his ground also, such person shall pay the owner of such fence already erected one-half the value of so much thereof as serves as a partition fence between them.¹

SEC. 6. When two or more persons own land, adjoining, which is enclosed by one fence, and it becomes necessary for the protection of the rights and interests of one party that a partition fence should be made between them, the other or others, when notified of such fact, shall proceed to erect or cause to be erected one-half of such partition fence, said fence to be erected on, or as near as practicable, the line of said land; and if, after notice is given by either party, and a reasonable length of time has elapsed, and the other party persist in refusing to erect, or cause to be erected, one-half of such fence, the party giving notice may proceed to erect, or cause to be erected, the entire partition fence, and collect by law one-half the cost of such fence from the other party.¹

SEC. 7. All partition fences separating adjoining enclosures, shall stand upon the line, and any person or persons when erecting a partition fence, and refusing to place it on the line dividing such lands, or to remove it to such line when erected otherwise than thereon, shall subject himself to one-half the cost of its removal and erection in the right place.¹

SEC. 8. The respective owners or lessees of lands which now are, or hereafter may be enclosed with fences, shall keep up and maintain in good repair all partition fences between their own and the next adjoining enclosures, in equal shares, so long as both parties continue to occupy or improve the same.¹

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¹ Wood's Dig. art. 2480, 2481.

## ACT OF MARCH 31, 1855, TO PREVENT THE TRESPASSING OF ANIMALS UPON PRIVATE PROPERTY.

SECTION 1. If any horse, mule, jack, jenny, hog, sheep, goat, or any head of neat cattle, should break into any ground enclosed by a lawful fence, the owner or manager of such animal shall be liable to the owner of such enclosed premises for all damages sustained by such trespass; and if the trespass be repeated, by neglect of the owner or manager of such animals, he shall for the second and every subsequent offence or trespass, be subject to double the damages of such trespass, to the owner of said premises.

SEC. 2. If any owner or occupier of any grounds or crops, trespassed upon by animal, or animals, entering upon or breaking into his or their grounds, whether enclosed by a lawful fence or not, shall kill, maim or materially injure the animal or animals so trespassing, he, she or they shall be liable to the owner of such stock for all damages, and for the cost accruing from a suit for such damages, when necessarily resorted to for their recovery; *provided*, the owner or occupier of such grounds and crops so damaged and trespassed upon, may take up and safely keep, at the expense of the owner or owners thereof, such animals for ten days, and if not applied for by the proper owner or owners before the expiration of ten days, the same may be posted under the "estrays laws" of the state, and before restitution shall be had by the owner or owners of such animals, all damages done by them, as well also as the expense of posting and keeping them, shall be paid. Any justice of the peace in the township shall have jurisdiction of all such reclamation of animals, together with the damages, expense of keeping and posting the same, when the amount claimed does not exceed five hundred dollars.

SEC. 3. When two or more persons shall agree to cultivate lands under one enclosure, neither of them shall place, or cause to be placed, any animal on his, her or their ground, to the injury or damage of the other or others, but shall be liable for all damages thus sustained by the other or others; and if repeated after due notice is given, and for every such subsequent repetition, double damages. It shall not be necessary to prove any express

agreement to cultivate under one enclosure, but the fact of such cultivation shall be deemed sufficient evidence of such agreement.

## FORMS.

*Notice to be Posted.*

## ESTRAY NOTICE.

Notice is hereby given, that on the fifth day of June, 1859, a horse was found on my premises, in                      township, Alameda county, said horse being a bay horse, fifteen hands high, with four white feet, white nose, branded K on the left hip, and a half-breed, which I have taken up. The owner is requested to call and prove property, pay charges, and take away the same.  
June 10th, 1859.    JOHN BART.

*Affidavit before a Justice.*

County of Alameda, ss.

John Bart, being duly sworn, says, that on the fifth day of June, 1859, he found upon his premises, in                      township, county of Alameda, a half-breed bay horse, with four white feet, white nose, and branded K on the left hip; that he has made diligent inquiry throughout his neighborhood to ascertain the ownership of said stray horse, but has not been able to learn any thing whatever in regard to the same; that ten days ago he posted a written notice, of which the annexed is a copy, in three public places in said township, one of which was on the premises of deponent, one at the tavern of Jabez Prime, and one at the office of G. H., justice of the peace; that he has examined the county records of marks and brands, and did not find the said brand of said horse upon record.

Deponent further states that the said brand upon said horse has not been altered since he came upon the premises of deponent, nor has any other brand or mark been put upon him; that the owner or owners of said horse are unknown to deponent, and that deponent has no other knowledge concerning the said horse than that herein given; that since said horse came upon the premises of deponent, he has been in his possession, care and keeping, and that it is the desire of deponent to take up and post the said animal.

JOHN BART.

Sworn before me, June 15, 1859,

G. H., Justice of the Peace,                      }  
for                      township, Alameda county. }

*Appointment of Appraisers of Estray Animals.*

In the matter of the estray horse } Alameda County,  
 posted by John Bart. } township,  
 G. H., Justice.

John Bart having this 15th day of June, 1859, appeared before me and made affidavit as to a certain bay horse found upon his premises in this township, June 5th, 1859, and that he has put up written notices of the same, according to law, which affidavit has been duly filed with me, I do hereby appoint A. B. and C. D., appraisers, they being resident householders of this county, to appraise and describe said animal.

G. H., Justice.

*Appraisement of Estray Animal.*

In the matter of the estray horse }  
 posted by John Bart. }

We, the undersigned, the appraisers in this matter, duly appointed by G. H., justice of the peace of this county, do certify that on the 16th day of June, 1859, we proceeded to view the said horse, and we find, according to our best knowledge and judgment, that the said horse, being a bay horse, fifteen hands high, with four white feet, white nose, full mane and tail, and branded with the letter K on the left hip, is about ten years of age, and of the value of seventy-five dollars or thereabouts.

June 18th, 1859.

A. B.  
 C. D.

County of Alameda, ss:

A. B. and C. D., the appraisers named in the above certificate, being duly sworn, each for himself says, that the matters therein set forth are true.

Sworn before me, June 17th, 1859, }  
 G. H., Justice. }

A. B.  
 C. D.

*Order of Restitution of Estray.*

County of Alameda, } ss: Justices' Court.  
 Township, }

John Bart having taken up a bay horse found on his premises, and having duly posted the same, and filed his affidavit thereof with me on the 15th day of June, 1859, and M. N. now appearing before me on this 25th day of May, 1860, claiming to be the owner of said horse, and having made satisfactory proof of such ownership, I do hereby order that the said horse be delivered up to said M. N., on paying the costs of the proceeding before me, taxed at                      dollars, and the sum of

dollars awarded by me to said John Bart, as his expenses for keeping said horse [*or, without any payment to said John Bart, that he has worked, ridden and used said estray horse sufficiently to compensate for all expenses of keeping*]. G. H., Justice.

*Notice of Sale.*

[UNDER SECTION 7 OF ESTRAY ACT AS AMENDED.]

**ESTRAY SALE.**

By virtue of an order of sale to me directed by G. H., justice of the peace of \_\_\_\_\_ township, county of Alameda, notice is hereby given, that I will offer for sale at public auction, on the 25th day of June, 1860, at twelve o'clock M., in front of the office of said justice in said county, one bay horse, branded K on the left hip, the same being an estray taken up on the 5th day of June, 1859, by John Bart, and duly posted, to pay the sum awarded to said John Bart by said justice, for the expense of keeping said horse and the costs.

May 25th, 1859.

P. Q., constable of said township.

[Or, where the appraised value is over hundred dollars].

R. S., sheriff of said county.

*Notice to Show Cause.*

County of Alameda.  
The People, &c., *ex rel.* X. Y., district  
attorney of said county,  
*against*  
John Bart.

Justice's Court,  
township.

**The People of the State of California to John Bart, defendant:**

Take notice, that you are required to appear before G. H., justice of the peace, at his office in the county of Alameda, on the \_\_\_\_\_ day of June, 1860, to show cause, if any you can, why judgment should not be taken against you for the sum of \_\_\_\_\_ dollars, the one-half of the appraised value of a certain bay horse taken up by you on the 5th day of June, 1859, with costs, [or, under the act of 1859, the sum of \_\_\_\_\_ dollars, the appraised value of, &c., &c.]

June , 1860.

**SWIFT BROWN, District Attorney.**

## CHAPTER XVIII.

## EXECUTORS AND ADMINISTRATORS.

## OUTLINE OF CALIFORNIA PROBATE SYSTEM.

THE duties and liabilities of executors and administrators being so nearly alike, are considered together in this chapter; and in connection herewith the reader is referred to the chapter on WILLS.

The objects of administering upon the estate of a deceased person are, principally, to collect what may be owing to him, to pay what he may legally owe, and in some cases to establish record evidence of the title to real estate in the heirs or devisees.

Where these objects can be safely and legally accomplished without the formula of proceedings in the Probate Court, and the will of the deceased does not render it necessary, administration may be dispensed with.

The right of administration upon an estate is obtained from the Probate Court of the county in which the deceased resided, by filing a petition stating the facts, which must be sufficient to give the court jurisdiction; and after due notice has been given, upon the day appointed, a hearing is had before the court, and if the applicant is so entitled, the court makes an order granting him the administration; and upon filing a bond approved by the judge, in a penalty double the amount of the personal property of the deceased, he receives his letters of administration and is qualified to act.

The same general mode of procedure is necessary for an executor, except that, in addition to the petition, he files also the will of the deceased, which must be duly proved and admitted to probate; and where the will in terms dispenses with the bond, the executor is entitled to letters testamentary without giving any security.

When the executor or administrator has qualified, he becomes



liable for the safe keeping, protection and proper management of the estate, and for the collection of whatever property is due to the deceased.

The whole real and personal estate is vested in the heir, but the executor or administrator is entitled to the possession until the estate is settled or delivered over by the order of the court to the heirs or devisees.

He is required immediately to advertise in some newspaper of the county, for as long a time as the court shall direct, at least once a week for four weeks, a notice to all creditors of the deceased, to present their claims to him, either at his residence or place of business, within ten months from such publication. If such claims be not presented within ten months from the first publication of the notice, or within ten months from the day they fall due, they are forever barred, and the executor or administrator has no right to pay them.

The claim, when presented, must be accompanied by the written affidavit of the claimant, and by vouchers, where such exist, to establish and prove the claim. It is held by the Supreme Court that this course must be pursued even when the claim is secured by a mortgage upon real estate.

If the claim be a just one, the administrator or executor should endorse his approval upon it, and the claimant should then, without delay, present it to the probate judge for his approval, which being obtained, the claim should be filed in the Probate Court, to be paid in due course of administration; subject, however, to the right of the heirs to question the same, whenever thereafter the court is asked to order a sale of real estate, to pay the debts of the deceased.

If the claim be rejected by the executor or administrator, or by the judge, a suit must be brought upon it against the executor or administrator, within three months after such rejection, or within three months after the same becomes due, or it will be forever barred.

It is not lawful to allow any claim that is barred by the statute of limitations—or in popular language—*outlawed*.

If the executor or administrator doubts the correctness of a claim, he may have it determined by a referee selected under the approval of the probate judge.

At every term of the court during the pendency of the administration, the executor or administrator is required to file in court a statement of the claims presented, with the names of the creditors, the amount, when due, and whether approved or rejected by him.

The next step in the administration, is to file a sworn inventory of all the property of the estate which has come to the knowledge and possession of the executor or administrator, and to have the same appraised by appraisers to be appointed for that purpose by the court; and if this be neglected, it is the duty of the court to revoke the letters of the executor or administrator.

When the appraisers return the inventory with the appraisement, the same is filed in the court; and if there be a family, application should be made to the court for an order setting aside for the family the homestead and all property exempt from execution; and making an allowance out of the estate for the support of the family. An allowance for the family support may also be made at the time of granting letters, to serve until the inventory comes in.

As soon as the probable amount of legal indebtedness of the deceased can be ascertained, if the amount of money of the estate will not prove sufficient to pay the same, and also the allowance to the family and the expenses of administration, the executor or administrator must proceed to sell enough of the property of the estate to raise a fund for that purpose.

This sale can only be made upon the order of the court to be obtained after petition, and notice of the application duly published; or, upon the hearing of this application, all persons interested may come in and make opposition; and the heirs may question any claims against the deceased, which have been duly presented and allowed, and ranked as established debts against the estate, except where the will especially directs the executor to sell; but in all cases a report of sale must be made to the Probate Court for its confirmation, before it becomes complete and binding. No real estate can be sold to pay debts until the personal estate is first disposed of.

At the third term of the court after his appointment, and thereafter whenever required, the executor or administrator must

render, for the information of the court, an exhibit under oath, showing the amount received and expended by him, the claims presented against the estate, and the condition of the estate.

When the ten months after the first publication of notice to creditors have expired, the estate may be closed if it be in a condition for that purpose. But the executor or administrator is allowed one year, at which time he should make a report and render his account, and if the estate is not then in a condition to be closed he should ask the court for an extension of time. He should render an annual account as long as the administration is pending, and after the lapse of one year may be required to render an account at any time.

Whenever an account is rendered, it should be passed upon by the court after notice duly given, so that all persons interested in the estate may come in and make their opposition. When the account is settled the court makes an order for the payment of the debts, as the circumstances of the case may require. If there be not money enough to pay all the debts, a payment *pro rata* is ordered.

The executor or administrator is not obliged to pay any debts until the year has expired and the order of the court is made for that purpose, except the funeral expenses, the expenses of the last sickness, and the allowance to the family of the deceased, which latter he must pay as soon as he has funds of the estate in hand sufficient for that purpose.

It is a common practice, however, to pay debts that have been duly allowed and approved before that time, if he is confident that they will not be finally disallowed, and that there will be money enough to pay in full all the debts and claims against the estate, and to have the final order of the court for the payment of debts so paid and those to be paid. Such payments, however, are made upon the judgment and at the personal risk of the administrator or executor. Sometimes he takes security to indemnify himself against any loss, and the Supreme Court has held that a bond given for such a purpose will be good.<sup>1</sup>

When the account is rendered and settled, and a payment of debts ordered, if the amount of debts equals or exceeds the

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<sup>1</sup> Comstock v. Breed, et al., January Term, 1859.

amount of estate on hand, there being no further estate to administer upon, the executor or administrator, after making such payments, should report the same to the court and be at once finally discharged.

If, however, there be a surplus, he should apply for an order of distribution of the estate to the heirs or devisees, and for this purpose, publication being made for four weeks, the heirs or devisees, and parties interested, should appear at the time appointed, that the court may ascertain to whom and in what proportions the balance of the estate belongs.

Upon the hearing of this matter, it may be necessary to make division of real estate; and unless the parties can agree among themselves as to a division, the court will appoint commissioners to ascertain the character and value of the land, and to make a partition of the same, and report to the court.

After the division and distribution is settled upon, and the heirs and persons entitled are ascertained, the court makes its decree of distribution.

The executor or administrator should then deliver up to the person or persons entitled, respectively, all the property in his hands less his own commissions, and take receipts and acquittances therefor.

The commissions are seven per cent. upon the first thousand dollars' worth of property administered upon, five per cent. upon the next ten thousand, and four per cent. upon the balance.

The amount of commissions should be ascertained and settled by the Probate Court in the final account of receipts and disbursements of the executor or administrator. In the case of public administrators the commissions are four per cent. upon the whole estate.

After delivering up and paying over the balance of the estate, the executor or administrator should report the same to the court, and file the receipts and acquittances; and is then entitled to an order of final discharge.

The foregoing is an outline of the office and duties of an executor or administrator under the California probate system, which must be necessarily very brief for the purposes of a work of this character.

For a full and complete collection of all the statutes and de-

cisions of the Supreme Court upon this subject, and also upon the subject of guardians and the estate of minors, with forms and directions of proceeding, the reader is referred to "The California Probate Practice," published in San Francisco by the author of the present work, from which a few forms are taken to conclude this chapter.

## FORMS.

*Petition for Probate of Will in the County of which Deceased was a Resident at the time of his Death.*

To the Honorable the Probate Court [or, the Probate Judge] of the City and County of San Francisco, State of California:

Your petitioner, John Clay, of San Francisco, herewith presents to this court the last will and testament of Henry Clark, deceased, and sheweth as follows:

That said Henry Clark died, in the county of Los Angeles in this state, on or about the fifth day of January, 1858, being at that time a resident of the city and county of San Francisco, and leaving real and personal estate of the value of ten thousand dollars.

That Mary W., the wife, and Alexander C., the father of the deceased, residents of this county, are the only heirs at law.

That John Black and Susan Black, minors, residing in the county of Sacramento, and the said wife and father of said deceased and your petitioner are the devisees under said will.

That your petitioner and Richard Ross are named therein as executors, and the said Richard Ross, intending to decline said trust, presents and files herewith his renunciation thereof.

Wherefore your petitioner prays that said will may be admitted to probate, and letters testamentary issued to him, and that this honorable court would for that purpose appoint a day, and order notice of the same to be given by publication, and that citations may issue to the heirs residing in this county and all other necessary and proper orders may be made in the premises.

And your petitioner will ever pray, &c.

April 12th, 1858.

JOHN GRAY.

*Petition for the Probate of a Will in the County in which Deceased may have died, leaving Estate therein and not being a Resident of this State.*

To the Honorable the Probate Court [or, the Probate Judge] of the County of Sacramento, State of California:

The petition of Albert Bull, of the city of Sacramento, respectfully sheweth—

That John Porter died in this county on the first day of Feb-

ruary last, leaving personal estate therein to the value of twelve thousand dollars, or thereabouts. That said deceased was at the time of his death a resident of the state of Kentucky, at which place all the heirs of deceased reside, as your petitioner is informed and believes.

That said deceased left a will wherein your petitioner and Peter Thomas and James Rose are named as executors, which is herewith presented and filed in this court as the last will and testament of said John Porter, deceased.

And your petitioner prays that the same may be admitted to probate, and that letters testamentary thereon may be issued after proper hearing and proof, and for that purpose, that a day may be appointed, and due notice be given by publication, and that citations issue to said executors [*insert names of those executors residing in the county*], and, that all other orders be made, and proceedings be had, in the premises, according to law.

Dated, Sacramento, February 5th, 1858.

ALBERT BULL.

*Petition for Probate of Will in the County in which any Estate may be, Deceased having died out of the State, and not being a Resident thereof at the time of his Death.*

To the Probate Court [*or, the Probate Judge*] of El Dorado County, State of California:

The petition of Abel Williams respectfully shows to this court—

That your petitioner has received information of the death of Andrew Reed, a resident of the territory of Oregon, who died at his residence in the said territory on the tenth day of July, 1857.

That said deceased left a will in which, as your petitioner has learned within the last thirty days, he is named as one of the executors, and which is herewith presented and filed in court.

That said deceased left estate in this county and in other counties of this state, but no application for letters testamentary upon said will has been made in any other county.

Wherefore your petitioner would humbly pray that said will may be admitted to probate, and that letters testamentary thereon may be issued to him, and for such purpose that a time be appointed and all persons interested be notified and cited as required by law, and that all other necessary orders in the premises be made by this honorable court.

ABEL WILLIAMS.

*Letters Testamentary.*

State of California, City and }  
 County of San Francisco. }

The last will of Henry Clark, deceased, a copy of which is hereto annexed, having been proved and recorded in the Probate Court of the city and county of San Francisco, John Clay, who is named therein, is hereby appointed executor.

Witness: William Duer, clerk of the Probate Court, of  
 [L. s.] the City and County of San Francisco, with the seal of  
 the court affixed, the 26th day of April, A. D. 1858.

By order of the Court.

WILLIAM DUER, Clerk.

State of California, City and }  
 County of San Francisco. }

I do solemnly swear that I will support the Constitution of the United States and the Constitution of the State of California; that I will faithfully discharge the duties of executor of the estate of Henry Clark, deceased, according to law.

Subscribed and sworn [or, affirmed, as the case may be] before  
 me, this 26th day of April, 1858. JOHN CLAY.

D. P. BELKNAP, Deputy Clerk of the Probate Court.

*Petition for Letters of Administration.*

To the Honorable, the Judge of the Probate Court of the City  
 and County of San Francisco:

The petition of Sarah Mark, widow of said deceased, respectfully sheweth, that Harris Mark died in the county of Alameda, state of California, on or about the 3d day of January, A. D. 1858. That said deceased, at, or immediately previous to the time of his death, was a resident of the city and county of San Francisco, state of California, and that he has left estate in this city and county, and within the jurisdiction of this court. [*Vary this paragraph according to the circumstances under the provisions of section 2.*]

That due search and inquiry have been made to ascertain if said deceased left any will and testament, but none has been found, and according to the best knowledge and belief of your petitioner, said deceased died intestate.

Your petitioner further shows that the estate of said deceased, so far as she has been able to ascertain the same, is of about the value of twenty thousand dollars, and consists of as follows: real estate in the city and county of San Francisco, of the value of \$15,000, or thereabouts; personal estate, stock in trade in the painting business, about \$3,000; notes, debts, &c., about \$2,000; that the only heirs at law of said deceased, so far as known to

your petitioner, are Charles, Sarah and Mary Ann, minor children of said deceased.

Wherefore, your petitioner prays, that a day of court may be appointed for hearing this application, that due notice thereof be given by the clerk, by posting notices according to law, and that upon said hearing, and the proofs to be adduced, letters of administration upon said estate may be issued to your petitioner. And your petitioner will ever pray, &c. SARAH MARK.

Dated January 25th, 1858.

State of California, }  
City and County of San Francisco, } ss:

Sarah Mark, the above-named petitioner, being duly sworn, says that she has read the foregoing petition, and knows the contents thereof, and that the same is true of her own knowledge, except as to the matters therein stated to be on information or belief, and as to those matters, she believes it to be true.

SARAH MARK.

Subscribed and sworn to before me, this 25th day of January, 1858. E. P. PECKHAM, Notary Public.

*Bond of Administrator or Executor.*

Know all men by these presents, that we, Sarah Mark, principal, and J. C. Horan and Edward Willett, sureties, are held and firmly bound to the state of California, in the sum of ten thousand dollars, lawful money of the United States of America, to be paid to the state of California, for which payment, well and truly to be made, we bind ourselves, our heirs, executors, administrators and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 8th day of February, 1858.

The condition of the above obligation is such that, whereas the above bounden Sarah Mark has been appointed administratrix [or, executrix] of the estate of Harris Mark, deceased, by the order of the Probate Court of the city and county of San Francisco, state of California, of this date.

Now therefore, if the said Sarah Mark shall faithfully execute the duties of her trust according to the law, then this obligation to be void, otherwise to remain in full force and effect.

SARAH MARK.	[L. s.]
J. C. HORAN.	[L. s.]
EDWARD WILLETT.	[L. s.]

Sealed and delivered in the }  
presence of S. L. LUPTON. }



State of California, }  
 City and County of San Francisco, } ss.

J. C. Horan and Edward Willett being duly sworn, each for himself says, that he is a freeholder resident in this state, and is worth the said sum of ten thousand dollars over and above all his just debts and liabilities, exclusive of property exempt from execution.

J. C. HORAN,  
 EDWARD WILLETT.

Sworn before me, this 8th day of February, 1858. }

S. L. LUFTON, Deputy Clerk. }

[*Endorsement.*] Approved this 8th day of February, 1858.

T. W. FREELON, County Judge.

*Order for Letters after Opposition.*

State of California, }  
 City and County of San Francisco. } In Probate Court.

In the matter of the Estate of } Order appointing Admin-  
 Isaac Levick. } istrator.

The petition of Robert C. Rogers, public administrator, praying for letters of administration upon the estate of said deceased, coming on to be heard, and due proof having been made to this court that the clerk had given notice thereof by causing notices to be posted up in at least three public places in the city and county, one of which was at the place where the court was held, stating the name of the deceased, the name of the applicant and the term of the court at which the application would be heard, the same having been given at least ten days before the hearing, and that the notice was in all respects according to law; and the hearing of the same having been duly continued to this day, and it being proved by the oath of the petitioner and of S. Hubbard and A. C. Forbes, that the said Isaac Levick died on or about the twelfth day of September, 1857, at sea, and that he was a resident of the city and county of San Francisco at the time of his death, and has left estate in this city and county, and within the jurisdiction of this court; and Thomas Trounce, a person interested in said estate, appearing to contest the application of the said petitioner, having been heard, and it appearing to the satisfaction of the court that the allegations in the petitions of the said Rogers are true:

It is ordered that the said Robert C. Rogers be and he is hereby appointed administrator of the estate of the said Isaac Levick, deceased, and it is ordered that letters of administration upon the estate of the said deceased issue to the said Rogers, the public administrator.

T. W. FREELON, County Judge.

*Another form of the same.*

State of California, }  
 City and County of San Francisco. } In Probate Court.  
 In the matter of the Estate of }  
 John C. Cabaniss, deceased. }

And now this thirty-first day of May, in the year of our Lord one thousand eight hundred and fifty-eight, at the May term of the Probate Court for the city and county of San Francisco, begun and holden at the City Hall in said city and county, on the third Monday of May, to wit: on the seventeenth day of May, in the year aforesaid; the petition of Robert C. Rogers, public administrator of, in and for the city and county of San Francisco aforesaid, praying for letters of administration on the estate of John C. Cabaniss, late of San Francisco, deceased, to be issued to him, and the written opposition thereto of Moses G. Noble, and also the petition of said Noble, praying for letters of administration to be issued to himself on said estate, coming on to be heard at the same time; and it appearing to the court that due proof by affidavit on file had been made, that notice had been given of both said petitions according to law, and legal proofs having been made of all the allegations contained in said petition of said Robert C. Rogers, public administrator, as aforesaid; and the allegations and proofs of the opponent and petitioner Noble having been heard and fully considered by the court at the different sessions of said court, held for the hearing thereof as well as other matters:

It is therefore ordered and decreed, that the petition of said Moses G. Noble, praying for letters of administration on the estate of said John C. Cabaniss, deceased, be denied, and the same is hereby denied, and the opposition of the said Noble to the petition of said Rogers, public administrator as aforesaid, be and the same is hereby overruled.

And it is hereby further ordered, adjudged and decreed, that letters of administration on the estate of said John C. Cabaniss, deceased, be issued to the petitioner, Robert C. Rogers, public administrator of the said city and county of San Francisco.

M. C. BLAKE, County Judge.

*Letters of Administration.*

State of California, }  
 City and County of San Francisco. }

Sarah Mark is hereby appointed administratrix of the estate of Harris Mark, deceased.

Witness, William Duer, clerk of the Probate Court, with  
 [L. s.] the seal of the Probate Court of San Francisco county,  
 affixed this 8th day of February, A. D. 1858.

By order of court,

WILLIAM DUER, Clerk.

State of California,  
City and County of San Francisco. }

I do solemnly swear, that I will support the constitution of the United States and the constitution of the state of California; that I will faithfully discharge the duties of administratrix of the estate of Harris Mark, deceased, according to law.

SARAH MARK.

Subscribed and sworn [or, affirmed, *as the case may be*] before me, this eighth day of February, 1858.

T. W. FREELON, Judge of the Probate Court.

*Order Revoking Letters for Failure to give New Bond.*

In the Probate Court of the City and County of San Francisco:

In the matter of the Estate  
of J. Willard Barker, deceased. }

James Thompson, executor of the last will and testament of J. Willard Barker, deceased, having neglected to give new sureties, to the satisfaction of the judge, on his bond as executor, as aforesaid, within the time prescribed by the order of this court of the fifteenth of March inst., it is now ordered, that the letters testamentary of the estate of said Barker, deceased, heretofore issued to said Thompson by this court, be, and the same are hereby revoked.

San Francisco, March 22, 1858.

T. W. FREELON, County Judge.

*Order for Special Letters.*

In the Probate Court, City and County of San Francisco, State of California.

In the matter of the Estate of  
Hamilton Bowie, deceased. }

It appearing to me, upon the petition of Mrs. Mary Bowie, widow of the said Hamilton Bowie, deceased, that said deceased departed this life on or about the twenty-first day of September, A. D. eighteen hundred and fifty-six, in the republic of Nicaragua, Central America, and that he was, at the time of his death, a resident of the said city and county of San Francisco, and that he died intestate, leaving property and estate in said city and county, and that said petitioner is the widow of said deceased, and prays general letters of administration on said estate, and in the mean time special administration thereon; and the said allegations in said petition appearing to be true by witness, and it likewise appearing that there has been delay in taking out letters of administration on said estate, it is ordered that Monday, the tenth day of May, 1858, be appointed for the hearing of said ap-

**RANSBROFF'S CALIFORNIA LAWYER.**

petition for general letters of administration upon said estate, and that such general letters be granted, that said Mary Bowie be appointed special administratrix of said estate, with full power and authority to collect and take charge of the estate of the deceased, in whatever county or counties the same may be found, and to exercise such other powers as may be necessary for the preservation of said estate, and that letters as such special administratrix shall issue to said Mary Bowie, on giving bond in the sum of seven thousand dollars, with sureties to the satisfaction of the undersigned probate judge.

San Francisco, April 24, 1858.

M. C. BLAKE, County Judge.

***Appointment of Appraisers.***

In the Probate Court, of the City and County of San Francisco:

In the matter of the Estate of }  
Alexis Williams, deceased. }

Letters of administration having been granted to I. Lawrence Park, and application being made to the court for appointment of appraisers, to appraise the estate of said deceased:

It is hereby ordered that C. C. P. Parker, George Jones and Samuel Swift, three disinterested persons, competent and capable to act as appraisers.

San Francisco, April 1st, 1858.

M. C. BLAKE,  
Probate Judge.

***Inventory, with the Affidavits, &c.***

Probate Court, City and County of San Francisco:

In the matter of the Estate of }  
Alexis Williams, deceased. }

I, William Duer, county clerk of the city and county of San Francisco, and ex officio clerk of the Probate Court, do hereby certify that C. C. P. Parker, George Jones and Samuel Swift have been duly appointed appraisers of the estate of Alexis Williams, deceased, by order of the court, duly entered and recorded on the 1st day of April, A. D. 1858.

Witness my hand, and seal of said Probate Court, this  
1st day of April, 1858. WILLIAM DUER, Clerk.

State of California, }  
City and County of San Francisco, } ss:

C. C. P. Parker, George Jones and Samuel Swift, duly appointed appraisers of the estate of Alexis Williams, deceased, being duly sworn, each for himself says, that he will truly, hon-

estly and impartially appraise the property of said estate which shall be exhibited to him, according to the best of his knowledge and ability.

Subscribed and sworn before me, this }	C. C. P. PARKER.
17th day of May, 1858. }	GEORGE JONES.
JOHN HANNA, Deputy Clerk. }	SAMUEL SWIFT.

### Inventory and Appraisement.

In the matter of the Estate of }  
Alexis Williams, deceased. }

#### REAL ESTATE.

1. A certain lot of land in the city and county of San Francisco, described as follows, etc., etc., valued at - - - - - \$10,000 00
2. A certain tract of land in the county of Alameda, described, etc., etc., valued at - - - - - 5,000 00

#### PERSONAL ESTATE.

3. Promissory note, made by John Hoyt, dated May 1, 1857, for \$1,000, endorsed by Wm. Pitt. Payment of \$200 receipted. Valued at - 800 00
  4. Promissory note, Peter Hanks, \$375, considered worthless - - - - -
  5. One horse, valued at - - - - - 200 00
  6. One-half partnership interest in the house of Holman, Williams & Co., valued at - 5,000 00
  7. Clothing and furniture, small items, valued at - 47 00
  8. Moneys that have come to the hands of the administrators - - - - - 1,083 25
- 
- \$22,130 25

State of California, }  
City and County of San Francisco. } ss:

I. Lawrence Pool, administrator of the estate of Alexis Williams, deceased, being duly sworn says, that the annexed inventory contains a true statement of all the estate of the deceased that has come to the knowledge and possession of deponent, and particularly of all money belonging to said deceased, and all just claims of said deceased against this deponent.

I. LAWRENCE POOL.

Subscribed and sworn to before me, }  
this 17th day of May, A. D. 1858. }

WILLIAM R. SATTERLEE,

Deputy Clerk of the Probate Court.

**RECEIPT'S CALIFORNIA LAWYER.**

We, the undersigned duly appointed appraisers of the estate of **William** deceased, do certify that the property mentioned in the foregoing appraisement has been exhibited to us, and we appraise the same at twenty-two thousand one hundred and thirty-three and twenty-five cents.

C. C. P. PARKER.  
GEORGE JONES.  
SAMUEL SWIFT.

**James A. Blake** deceased.

T. Parker, Jones and Swift, Appraisers, Dr.

For services in appraising said estate, items as follows:

At \$5 per day each	-	-	-	\$30 00
Necessary disbursements as follows:				
For travel to and from county and return	-	-	-	1 50
				<hr/> \$31 50

Received payment,

C. C. P. PARKER.  
GEORGE JONES.  
SAMUEL SWIFT.

The bill of appraisers' fees allowed this 20th May, 1858.

M. C. BLAKE, Probate Judge.

State of California, } ss:  
City and County of San Francisco, }  
C. C. P. Parker, George Jones and Samuel Swift, the appraisers above named, being duly sworn, each for himself says, that the foregoing bill of items is correct and just, and that the services have been duly rendered as therein set forth.

Subscribed and sworn to before me, } C. C. P. PARKER.  
on the 20th day of May, A. D. 1858. } GEORGE JONES.  
NICHOLAS K. RUMBLE, } SAMUEL SWIFT.  
Deputy Clerk.

*Petition for Allowance for the Support of Family.*

(Filed for use of Court and Court.)

The petition of C. R. widow of A. B., deceased, respectfully sheweth:

That letters of administration have been granted herein to E. B. but that no letters of administration have yet been granted upon said estate, and that no inventory has been as yet returned to this court.

That your petitioners, and G. H., J. K. and L., the minor chil-

dren of said deceased, are without estate of their own, and wholly dependent on the estate of said deceased for maintenance; that said estate is amply able to provide an allowance to your petitioner for her support and that of her said minor children, to the extent of \$250 per month, and which is a reasonable amount for that purpose, according to their circumstances and accustomed mode of life.

Wherefore, your petitioner prays that an allowance out of said estate, to said amount of \$250 per month, for the support of the family of deceased until the return of said inventory, be made by order of this court.

C. B.

Sworn to, &c.

#### *Order Setting Apart Property.*

[*Title, &c.*]

The petition of C. B., being filed herein and presented to this court, and it appearing to this court that the inventory of the estate of deceased has been returned and filed, the same having been duly appraised, whereby it appears that said estate is possessed of property to the amount in value of \$20,000, and it further appearing by the said petition of C. B., the widow of deceased, that the amount of property included in said inventory, which is by law exempt from execution, is insufficient for the support of the said widow and the minor children of deceased, and that the sum of \$250 per month heretofore allowed by this court is insufficient for the purposes of such maintenance; and it further appearing by said petition that the debts of said estate are moderate, and do not exceed, in all probability, the sum of \$1,000, it is hereby ordered, that the order heretofore made in this estate, granting an allowance to the widow and children of deceased of \$250 per month be vacated, and that an allowance of \$300 per month be made from henceforth, and until the further order of the court, to be paid to said widow, monthly, on the first day of each month, by said administrator. And it is further ordered, that the homestead of said deceased, consisting of a certain lot with the dwelling-house thereon, situate, lying and being in the city of San Francisco, and described as follows, &c.: [*insert description*] and also the following articles mentioned and appraised in said inventory, to wit: [*insert the articles*] be set apart for the use of the family of deceased, the one-half part of all which property to set apart, shall belong to the said widow, and the remaining half, in equal shares, to John, James, Sarah, Ellen E., and Mary Ann, the minor children of deceased.

M. C. BLAKE, Probate Judge.

*Order for Allowance to Family.*

In Probate Court, City and County of San Francisco.

In the matter of the estate of }  
John Hart, deceased. }

It appearing to the court on the application of the executrix and executor of said estate, that said testator died leaving a widow and five children, four of whom are minors, and three of the minors females, and that the said widow and children are not possessed of any separate estate, and that a reasonable allowance out of the said estate is necessary for their support, it is therefore ordered by the court that the sum of twenty-five hundred dollars be allowed and set apart for the support and maintenance of said widow and minor children, for one year for and after the date of the letters testamentary herein, and also that the property belonging to said estate and exempt from execution shall also be set apart and reserved for the use of said widow and minor children.

T. W. FREELON, County Judge.

*Order of Publication of Notice to Creditors.*

City and County of San Francisco.

In the matter of the Estate of }  
Valentine Castro, deceased. }

It is ordered, that the notice to the creditors of the said Valentine Castro, deceased, requiring all persons having claims against the said deceased, to exhibit the same with the necessary vouchers, according to law, to be given by publication in the *Daily Alta California*—a newspaper printed and published in the city and county of San Francisco, twice a week—for the period of ten weeks.

T. W. FREELON, County Judge.

*Notice to Creditors, with Affidavit of Publication.*

Estate of Valentine Castro, deceased.

Notice is hereby given by the undersigned, administrator of the above-named estate, to the creditors of, and all persons having claims against said deceased, to exhibit the same, with the necessary vouchers, within ten months from the publication of this notice, to the undersigned, at his office, Nos. 36 and 38 Battery street, in the city of San Francisco.

GEO. C. JOHNSON, Administrator.

San Francisco, February 1, 1858.

City and County of San Francisco, ss:

A. D., printer [or, publisher], of the *Daily Evening Bulletin*,



a newspaper published in said city and county, being duly sworn, says, that the notice to creditors of the estate of Valentine Castro, of which the annexed is a copy, was published in said paper twice a week, for the period of ten weeks, from the first day of February, 1858, to the nineteenth day of April, 1858. A. D.

Sworn before me, April 20, 1858, }  
WM. F. SWASEY, Notary Public. }

*Creditor's Claim.*

In the Matter of the Estate of }  
Jabez Coit, deceased. }

Letters of administration upon the above-named estate having been granted to J. H. Fish, the undersigned presents his claim against said estate, with the necessary vouchers, to said J. H. Fish, administrator, for approval, as follows, to wit:

Estate of Jabez Coit,	To Robert C. Johnson, Dr.
To amount of promissory note herewith filed, dated	
January 5, 1858, - - - - -	\$500 00
To interest on same, from January 5, 1858, at 2 per cent.	
per month, till paid, - - - - -	
To cash loaned, May 1, 1856, - - - - -	50 00
To agreed price of horse, sold and delivered, March 6,	
1857, - - - - -	250 00

City and County of San Francisco, } ss:  
State of California, }

Robert C. Johnson, whose foregoing claim is herewith presented to the administrator of said estate, being duly sworn says, that the amount thereof, to wit, the sum of eight hundred dollars, with interest as above set forth, is justly due to this claimant, that no payments have been made thereon, and there are no offsets to the same to the knowledge of this claimant. ROBERT C. JOHNSON.

Subscribed and sworn to before }  
me, May 25, A. D. 1858, }

J. F. BOWMAN, Deputy Clerk.

*[Endorsement upon this claim.]*

The within claim is allowed and approved for \$500, with interest as claimed, and \$250 for the horse. The item of \$50 is without voucher or proof, is barred by the statute of limitations and is rejected.

May 25, 1858.

J. H. FISH, Administrator.

Allowed and approved, this 27th day of May, 1858, for all but the item of \$50, which latter is rejected.

M. C. BLAKE, Probate Judge.

*Petition for Sale of Personal Property.*

[Title, &amp;c.]

To the Honorable Probate Court, &amp;c :

The petition of A. B., administrator, respectfully sheweth, that there are claims against the estate of said deceased which have been duly presented and allowed by petitioner and this honorable court, amounting to the sum of \$1,000 ; that no money has come to the hands of your petitioner, except the sum of \$250, which has been paid out in the necessary expenses of administration, including the funeral expenses of deceased, and that for the payment of said claims and the further expenses of administration it becomes necessary to sell the personal property of said estate; that the said personal property is fully set forth in the inventory on file, to which reference is made.

Wherefore your petitioner prays for an order of sale, &amp;c.

Sworn to, &amp;c.

A. B., Administrator.

*Order of Sale of Personal Property.*

[Title, &amp;c.]

An application having been made to this court by the petition of A. B., the executor, duly verified and filed herein, for the sale of the personal property of said estate, for the purpose of [state the object], and due notice of the hearing of said application and of the time and place thereof having been given by [state by posting or advertising, and the particulars thereof ; if posting, ten days, if advertising, five days], and proof thereof being made to the satisfaction of this court and filed herein, and the same now coming on to be heard, in accordance with said notice, and said applicant appearing in person, and J. M. appearing in opposition, being a legatee and claiming, under the bequest of the deceased, a portion of the personal property of said estate, being two horses, mentioned and described in the inventory on file, and, after a full hearing of the matter, it appearing to this court that a sale of the personal property of said estate is necessary for [here state the object]. It is hereby ordered that such sale be made by public auction, at the house of said deceased, where said property is now present, and that notice of said sale, specifying the time and place thereof, be given by publication in the \_\_\_\_\_, a newspaper published in the city and county of San Francisco, for ten days immediately previous to such sale; and it is further ordered, that the said property so bequeathed to J. M. be reserved from sale until the residue of the personal [and real] property has been applied to the payment of the debts of the deceased.

M. N., Probate Judge.

*Report of Private Sales of Personal Property.*

In the Probate Court, City and County of San Francisco, State of California:

Report of Administratrix sale of personal property.

In the matter of the Estate of }  
James H. Wingate, deceased. }

In pursuance of an order of said court, made on the fifth day of October, A. D. 1857, authorizing said administratrix to sell a horse at private sale, and also of an order made on the second day of November, A. D. 1857, authorizing said administratrix to sell all the personal property at private sale, not set apart for the use of the administratrix, as surviving widow of said deceased, the said administratrix hereby reports:

That she has sold the said horse for the sum of \$150, being the highest price she was able to obtain therefor, and, as she is advised, the full value thereof; also that she has sold the wooden buildings situated on land at the south-east corner of Clay and Stockton streets, in said city of San Francisco, being 61 feet on Stockton street by 34 feet on Clay street, to George B. Moore, for the sum of \$700, which she is advised is the full value of said buildings, and \$100, or thereabouts, more than the same were valued at by the appraisers of said estate, said buildings being on leased land, and no other person offering a greater sum therefor.

Wherefore the said administratrix prays that said sales may be approved by the judge of this court, and that this report and said sales may be confirmed.

HELENA WINGATE, Administratrix.

*Order Confirming above Report.*

In the Probate Court of the City and County of San Francisco:

In the matter of the Estate of }  
James H. Wingate, deceased. }

Order confirming report of administratrix.

On reading and filing the report of Helena Wingate, administratrix of the estate of James H. Wingate, of the sale of personal property, and the affidavit of Clinton P. Scovill, showing that said administratrix has obtained the full value of the property mentioned in the said report, and it appearing to the court that the consideration has been paid to said administratrix:

It is hereby ordered, that the sale of the horse and buildings in said report mentioned be approved, and said sales are hereby confirmed, no objections having been made thereto, to wit: one horse, and the wooden tenements at the south-east corner of

Stockton and Clay streets, in San Francisco, being 61 feet on Stockton street and 34 feet on Clay street, in San Francisco.

T. W. FREELON, County Judge.

*Deed of Executor or Administrator.*

This indenture, made the                      day of June, Anno Domini eighteen hundred and fifty-eight, at the city and county of San Francisco, state of California, by and between A. B. and C. D., the duly appointed and qualified executors [or administrators] of G. H., deceased, late of said city and county of San Francisco, parties of the first part, and E. F., of the city and county of San Francisco and same state, party of the second part, witnesseth, that whereas, on the                      day of March, A. D. 1858, the Probate Court within and for the city and county of San Francisco, made an order of that date, authorizing and directing the said parties of the first part to sell certain real estate of the said G. H., deceased, situated in the said city and county, and particularly set forth and described in said order of sale, either as the same was therein described, or in such subdivisions and parcels as, in their judgment, would secure the largest price; a certified copy of which order of sale is on record in the office of the county recorder of the city and county of San Francisco, in book                      of                      , page                      and following, and is hereby referred to and made part of this indenture:

And whereas, under and by virtue of said order of sale, and pursuant to legal notices given thereof, the said parties of the first part, on the                      day of May, A. D., 1858, at the auction rooms of S. L. Jones & Co., in said city and county, between the hours of 10 o'clock A. M. and the setting of the sun on that day, offered for sale to the highest bidder, the real estate situated in the said city and county, and described in said order of sale, and at such sale the said party of the second part became the purchaser, for the sum of one thousand dollars, being the highest bid offered therefor, or the parcel or subdivision of land hereinafter particularly described:

And whereas, the said Probate Court, upon the return of said sale, made at the next term thereof by the said parties of the first part, did on the 17th day of May, A. D. 1858, make an order confirming said sale and directing conveyances to be made therefor, and directing a conveyance to be executed therefor, a certified copy of which order, confirming said sales and directing such conveyances is recorded in the office of the county recorder of the said city and county, in book "                      of deeds," page                      and following, and is hereby referred to and made part hereof:

Now, therefore, the said A. B. and C. D., executors [or admin-

istrators] as aforesaid, parties of the first part, pursuant to the order of the said Probate Court, for and in consideration of the sum of five hundred dollars, to them in hand paid, and five hundred dollars secured to be paid by the said E. F., party of the second part, the receipt whereof is hereby acknowledged, have granted, bargained, sold and conveyed, and by these presents do grant, bargain, sell and convey unto the said party of the second part, his heirs and assigns forever, all the right, title, interest and estate of the said G. H., at the time of his death, and also all right, title and interest acquired by the said parties of the first part for the estate of said E. F., since his decease, in and to that certain piece or parcel of land situated in said city and county of San Francisco, described as follows [*reference being had to the official map of said city and county, on file in the office of the recorder aforesaid*], to wit: [*description,*] together with the tenements, hereditaments and appurtenances whatsoever to the same belonging or appertaining. To have and to hold, all and singular the above mentioned and described premises, together with the appurtenances unto the said party of the second part, his heirs and assigns, to his sole use, benefit and behoof forever.

In witness whereof, the parties of the first part, executors [*or administrators*], as aforesaid, have hereunto set their hands and seals, the day and year first above written.

Signed, sealed and delivered in presence of }

A. B., [L. s.]

Executor [*or administrator*] of the estate of G. H., deceased.

C. D., [L. s.]

Executor [*or administrator*] of the estate of G. H., deceased.

State of California,  
City and County of San Francisco, } ss.

Be it known, that on this            day of June, 1858, personally appeared before me, a notary public, within and for the county aforesaid, A. B., and C. D., personally known to me to be the persons described in and who executed the foregoing deed, as executors [*or administrators*] of the estate of G. H., deceased, and severally acknowledged to me that they, as executors [*or administrators*] of the estate of G. H., deceased, executed the same freely and voluntarily, for the uses and purposes therein mentioned.

In testimony whereof, I have hereunto set my hand and affixed my seal of office, the day and year above written.

J. K., Notary Public.

*Exhibit to be made at Third Term.*

In the Matter of, &c. Probate Court, &c.

In accordance with the provision of the statute requiring the administrator of an estate at the third term after his appointment, to render for the information of the court an exhibit under oath, showing

- 1st. The amount of money received and expended.
- 2d. The amount of all claims presented against the estate, and the name of the claimant.
- 3d. All other matters necessary to show the condition of its affairs.

I, William Matthews, administrator of the estate of, &c., do hereby, at this, the third term, after my appointment by this court as such administrator, make and render this my account and exhibit of said estate.

1. Moneys received, as follows:

From the sale of personal property, - - -	\$1,000 00
" " rents of real estate, - - -	500 00
" interest money, - - -	700 00

2. Claims against the estate:

Funeral expenses, N. Gray, - - -	200 00
Physician's bill, expenses of the last sickness, Dr O. G. Bryant, - - -	250 00
Note of hand, I. Lawrence Pool, approved, - - -	10,000 00
Mortgage, H. P. James, approved - - -	5,000 00
Taxes for 1857-8, - - -	379 35
Other small debts, less than \$20 each, - - -	73 65

3. The affairs of said estate:

The debts of said estate amounting to nearly \$16,000, and the moneyed assets to \$2,200, a deficiency of some \$14,000 remains, which renders necessary a sale of some real estate, an application for which purpose is about being made to this court.

WILLIAM MATTHEWS, Administrator.

State of California, }  
County of Santa Clara, } ss:

William Matthews, administrator of the above named estate, being duly sworn, says, that the foregoing exhibit and statement rendered by him are true in substance and in fact.

Sworn to before me, this 10th } WILLIAM MATTHEWS.  
day of May, 1858. }

AUSTIN L. THOMPSON, Notary Public.

*Order to show Cause on Application to sue Real Estate.*

In the Probate Court of the County of San Francisco, State of California.

In the matter of the Petition of James Bowman, executor of the last Will and Testament of William Cumberland, deceased, for a sale of the Real Estate of the said deceased. }

It appearing by the petition of the said executors that there is not sufficient personal estate in his hands to pay the debts outstanding against the deceased and the expenses of administration, and that it is necessary to sell the whole or some portion of the real estate for the payment of such debts.

It is therefore ordered by the judge of said court, that all persons interested be and appear before him at the court-room of said Probate Court on Monday, the 22d day of September, A. D. 1855, at 11 o'clock, A. M. of that day [that time being specially appointed for the hearing of said petition] to show cause why an order should not be granted to the said executor to sell so much of the real estate of the deceased as should be necessary to pay such debts, and that a copy of this order be published at least four successive weeks in \_\_\_\_\_, a newspaper printed and published in the city of San Francisco.

August 18th, 1856.

T. W. FREELON,  
County Judge.

*Order of Sale of Real Estate.*

In the Probate Court in and for the County of San Francisco, State of California.

In the matter of the Estate of William Cumberland, deceased. }

It appearing to the court, upon the application of James Bowman, executor of the last will and testament of William Cumberland, deceased, that he presented to and filed in this court at the August term thereof, A. D. 1856, his petition in writing duly verified, showing that claims had been allowed against the said estate, and that there is not sufficient personal estate in the hands of the said executor to pay the debts outstanding against the deceased and the expenses of administration, and that it is necessary to sell the whole of the real estate for the payment of such debts; and upon such petition and application of said executor, it having been at said August term, 1856, ordered by the judge of this court that all persons interested should be and appear be-

fore him at the court-room of said Probate Court on Monday the 22d day of September, A. D. 1856, at eleven o'clock, A. M., of that day [that time being specially appointed for the hearing of said petition] to show cause why an order should not be granted to the said executor to sell so much of the real estate of the deceased as shall be necessary to pay such debts, and that a copy of the said order to show cause should be published at least four successive weeks in a newspaper published in the city of San Francisco; and on that day, at the time and place named in the said order, to show cause, upon due proof of the publication of a copy of the said order to show cause in pursuance thereof.

The court having fully heard and examined the allegations and proofs of the petitioner, and no person having opposed the same, and it appearing to the court upon such hearing and examination and proofs that claims to a large amount have been duly allowed and established against said estate, and are justly due by said estate to divers persons, which said claims are as follows: [*here insert,*] and that a sale of property is necessary for the payment, and it further appearing to the court that there is not sufficient personal property in the hands of the said executor to pay the debts outstanding against the deceased and the expenses of administration, and that it is necessary to sell the whole of the real estate for the payment of such debts, and it further appearing that no good reason exists why the said order of sale should not be granted as prayed for in said petition; now, on this 22d day of September, A. D. 1856, it is ordered and adjudged by the court that said James Bowman, executor as aforesaid, be and he is hereby authorized to sell the following real estate of said William Cumberland, deceased, at public auction to the highest bidder, on the following terms, to wit: for cash at the time of sale, to be paid on the day of sale or the day following.

And it is further ordered that before making such sale the said James Bowman, executor as aforesaid, shall give an additional bond with two or more sufficient sureties, in the penal sum of five thousand dollars, conditioned that the said executor shall faithfully execute the duties of the trust according to law.

That the said executor shall give notice of the time and place of holding such sale, according to the statute in such case made and provided, and shall in all things proceed, conduct and manage said sale as by the statute in such case is made and provided, is directed and required, and due return of his proceedings to the Probate Judge in and for the said county of San Francisco make, at the next term of the Probate Court after such sale.

The following is the real estate hereby authorized to be sold, being situated in the county of San Francisco and state of California, viz.:



1. The undivided half of the lot situate, lying and being in the city of San Francisco, known and described on the one hundred vara survey thereof as the one hundred vara lot number one hundred and sixty-one [161].
2. The one undivided half of a lot of land situated in the county of San Francisco, at the Mission Dolores, and formerly occupied by said Cumberland and John Hart, also since deceased, as a milk ranch, with buildings thereon, the lot being fifty varas square.
3. The one undivided half in a certain pre-emption claim near the Mission Dolores, taken up and occupied jointly by said Cumberland and Hart, both deceased.

T. W. FREELON, County Judge.

*Return of Proceedings on Sale.*

To the Honorable Probate Court, in and for the county of San Francisco, State of California :

James Bowman, executor of the last will and testament of William Cumberland, deceased, represents to this honorable court, that at the September term of this court, viz. : on the 22d day of September, 1856, an order of sale was duly made, on the application of this petitioner, of the real estate belonging to the estate of said William Cumberland, deceased, which real estate is mentioned and referred to herein below and in the schedule hereunto annexed and made part hereof, as by the records and files of this honorable court will more fully appear, reference thereunto being had.

That in pursuance of said order of sale and the statute in such case made and provided, your petitioner, through John Middleton, an auctioneer, did make the sales respectively and separately of the said lands and premises in the schedules hereunto annexed, mentioned and described, and to the persons therein opposite each piece named and for the prices therein set forth ; that said sale was made after due notice according to the statute in such case made and provided, and at public auction at the auction-room of said John Middleton, in the city of San Francisco, on Monday, November 10th, A. D. 1856, at 12 o'clock, M. ; that said purchasers were respectively the highest bidders for cash at the time of the sale.

That said sale was legally made and fairly conducted, as your petitioner is informed and believes, and that the sums respectively bid were not disproportionate to the value of the property sold, and that he is informed and believes that no sums respectively exceeding such bids, to the amount of ten per centum, ex-

clusive of the expenses of a new sale, could be obtained on another sale on said order.

And your petitioner further represents that the schedules hereunto annexed, marked A, B and C, show to the court a correct account of said sales, including the amounts respectively bid for such real estate, the expenses of conducting such sales and the net proceeds :

Wherefore your petitioner prays that this honorable court will make an order confirming the said sales and directing conveyance to be executed respectively to the said purchasers, conveying all the right, title, interest and estate of the said testator in the premises respectively at the time of his death.

And further, that the account of sales herewith furnished be also filed, approved and allowed by this honorable court.

JAMES BOWMAN, Executor, etc.,

By HOGG & WILSON, his Attorney.

State of California, }  
City and County of San Francisco, } ss :

James Bowman, executor of the last will and testament of William Cumberland, deceased, being duly sworn deposes and says, that he has read the foregoing petition, return and account of sales, and knows the contents thereof, and that the same are true of his own knowledge, except as to the matters therein stated on his information or belief, and as to those matters he believes them to be true.

JAMES BOWMAN.

Sworn to and subscribed before me, this }  
17th day of November, A. D. 1856. }

DENNIS LYON, Deputy County Clerk.

### *Order Confirming Sale of Real Estate.*

In the Probate Court, in and for the County of San Francisco,  
State of California.

In the matter of the Estate of }  
William Cumberland, deceased. }

It appearing to the court, on the application of James Bowman, executor of last will and testament of William Cumberland deceased, and by the return and account of sales by said executor, that in pursuance of the order of sale of the real estate of said testator, heretofore made, that said executor on the tenth day of November, A. D. 1856, at twelve o'clock, M., sold the premises hereinafter described to the persons and for the prices hereinafter mentioned, viz. :

1. The undivided half of the lot situate, lying and being in the city of San Francisco, known and described on the one hundred vara lot number one hundred and sixty-one [161] to Falkner, Bell & Co., for -	\$2,500 00
2. The one undivided half of the lot of land situate in the county of San Francisco, at the Mission Dolores, and formerly occupied by said Cumberland and John Hart, since deceased, as a milk ranch, with the buildings thereon, being fifty varas square, to Frederick Green, for -	250 00
3. The one undivided half of a certain pre-emption claim near the Mission Dolores, taken up and occupied jointly by said Cumberland and Hart, both deceased, to Frederick Green, for -	25 00
Total gross proceeds, - - -	\$2,775 00

And it further appearing and having been proven to the satisfaction of the court, that due notice of the time and place of holding said sale was posted up in three of the most public places in the said county of San Francisco, and published in the *Daily Alta California*—a newspaper printed and published daily in said county—for three weeks successively next before said sale, describing the said lands and tenements with common and sufficient certainty, and that said sale was made at public auction in the city of San Francisco, and in all things in conformity with the statute in such case made and provided, and that the said purchasers were respectively the highest bidders, and that they have respectively complied with the terms of sale; and it furthermore appearing to the court that said sale was legally made and fairly conducted, and that the sums respectively bid were not disproportionate to the value of the property sold, and that no sums exceeding the said respective bids can be obtained on another sale; and no person interested in the estate having filed or made any written objections to the confirmation of the said sale:

It is therefore ordered by the court, that the said sales to said respective purchasers be, and the same are, hereby respectively approved and confirmed, and the said executor is hereby ordered and directed to execute and deliver to the said respective purchasers, deeds and conveyances for the respective parts by them purchased, conveying to them respectively all the right, title, interest, and estate of the said testator in the premises at the time of his death.

T. W. FREELON, County Judge.

*Petition to Compel an Account.*

In the Matter of, &c. In Probate Court, &c.  
To the Hon. the Probate Judge, &c. The petition of Frederick Perring respectfully sheweth :

That your petitioner is a creditor of said deceased; that his claim, amounting to the sum of two thousand dollars, has been duly presented and approved, and is filed in court for payment; that C. D., the administrator of this estate, was appointed and qualified as such, on the tenth day of May, 1857, more than one year ago, and that he has never filed an account of his administration.

Wherefore, your petitioner prays that said administrator be compelled to render a full account of his administration to this time, or that his letters be revoked, and, for that purpose, that a citation be issued, requiring him to appear and show cause why an attachment should not issue.

Sworn to, &c.

FREDERICK PERRING.

*Order Appointing Day for Settlement of Account.*

In the Matter of, &c. In Probate Court, &c.

A. B., administrator, having filed his annual (or final) account of his administration of the estate of C. D. deceased, in this court, and rendered the same for settlement; it is ordered, that Monday, the fifth day of October, 1857, being a day of term of this court, to wit: of the term of 1857, at eleven o'clock, A. M., be appointed for the settlement of the same, and that the clerk of the court give notice thereof, by posting up notices in at least three public places in this county, at least ten days before said day of settlement, according to law.

September 20, 1857.

M. N., Probate Judge.

*Appointment of Guardian ad litem on Settlement of Account.*

In the Matter of, &c. In Probate Court, &c.

The account of A. B., administrator of the estate of C. D., deceased, having been rendered for settlement, and it appearing to the court that E. W., a minor, is interested in the estate. It is hereby ordered, that Horace P. Janes, Esq., a disinterested person, be appointed to represent the said minor, and, on his behalf, to appear on the settlement of said account and contest the same as may be for the best interest of said minor.

September 20, 1857.

M. N., Probate Judge.

*Exceptions to Account of Administrator.*

In the matter of, &c. In the Probate Court, &c.

Horace P. Janes, duly appointed by this court, guardian *ad litem*, to represent the minor heirs of the above-named estate upon the settlement of the account rendered by A. B., administrator, contests the said account, and says, that the same ought not to be allowed and approved as filed, and makes the following exceptions thereto.

1. He contests the claim of Jacob Saxe, on the ground that the same is barred by the statute of limitations, - - - - - \$872 50
2. He contests the claim of James Dellot, being a promissory note alleged to have been made by deceased, on the ground that said note was never made by deceased, and that his pretended signature thereto is a forgery, - - - - - 1,000 00
3. He contests the charge made for commissions, expenses, &c., by B. Q. & Co., auctioneers, on the sale of real estate, as being excessive, and containing items not allowed by law, - - - - - 732 81
4. He contests the charge by said administrator for carriage hire, as being unnecessary, - - - - - 175 00
5. He contests the charge of repairs to tenements on Jackson street for lack of voucher, - - - - - 138 50
6. He contests the charges of administrator's commissions as being more than authorized by law, - - - - - 4,372 25
7. He contests all the items over twenty dollars, not accompanied by vouchers.
8. He contests the amount of estate accounted for, said administrator not showing that the deficiency between his account and the amount charged in the inventory is without his fault.
9. He contests said account because said administrator has not accounted to the estate for all profits made by compromising certain claims.

October 5, 1857.

HORACE P. JANES,  
Guardian *ad litem*, &c.

*Order of Settlement of Annual Account.*

In the matter, &c. In Probate Court, &c.

The annual account of A. B., administrator herein, heretofore rendered, coming on for settlement on the fifth day of October inst., at which time proof was made to the satisfaction of the court and filed herein, that due notice of the settlement thereof had been given, and Horace P. Janes, Esq, duly appointed guardian *ad litem* to represent the minor heirs, appeared and filed his excep-

tions to said account, and the said account was referred to Wm. H. Sharp, Esq., as an auditor, to examine the same and report thereon, and said settlement was continued to this day by order of the court duly entered upon the minutes thereof.

And now, upon this twelfth day of October, 1857, at eleven o'clock, A. M., the time appointed as aforesaid, the said matter coming on to be heard, and the report of said auditor being filed, showing that the said account is correct, and is duly sustained by sufficient and proper vouchers, except as to the item of \$158 50, and that the exceptions of said guardian *ad litem* are without foundation, except as to the item above named, the item for commissions, \$4,372 25, the same not being chargeable until a final account be rendered, and the item of the claim of Jacob Saxe for \$872 50, which is barred by the statute of limitations, making in all the sum of \$5,403 25, and no exceptions being made to the said report, the same is confirmed.

And the allegations of the various parties being heard and considered, it is hereby ordered, adjudged, and decreed, that the said account being so settled, to wit: the said items of credits to said administrator to the amount of \$5,403 25 being disallowed, the said account be and the same is hereby in all other respects allowed and confirmed.

And it appearing that the said administrator has in his hands the sum of \$25,872 in cash, that the debts due by said estate are all of the fifth class in the order of payment; the funeral expenses, the expenses of the last sickness, and the expenses of administration to this period having been paid, and that said debts, amounting to the sum of \$50,000, have been duly presented and allowed in the manner required by law,

It is further ordered, adjudged, and decreed, that said administrator do pay upon said debts a dividend of fifty per cent. out of the said sum of \$25,872 in his hands, as aforesaid, to wit: that he pay to the creditors hereinafter named the amounts fixed after their names respectively, as follows:

B. C. & Co.,	-	-	-	-	-	\$5,580 00
H. W.,	-	-	-	-	-	3,110 00
&c., &c.,						&c., &c.

Making in all the sum of \$25,000, and that he pay to said guardian *ad litem* and said auditor the sum of fifty dollars each for their services herein rendered, leaving in his hands the sum of \$772 cash of the property of said estate.

And there being still a considerable amount of real estate unsold, and the debts being not all paid,

It is further ordered, that this administration be extended for the period six months for a final settlement of the estate.

October 12, 1857.

M. N., Probate Judge.

*Decree of Confirmation of Final Account and Closing the Administration.*

At a Probate Court held at the City Hall, in the city and county of San Francisco, at the January term of 1858, of said court, to wit: on the first day of February, 1858,  
Present: Hon. T. W. Freelon, Probate Judge.

In the matter of the estate of Percy }      Final Decree.  
G. Clare, deceased. }

Whereas Thomas H. Selby, heretofore, to wit: on the first Monday of January, 1857, duly appointed by this court administrator of the estate of Percy G. Clare, deceased, on the 11th day of January, 1858, filed in this court his final account as such administrator with a petition praying that a day be appointed for a settlement of the same, and that the administration be closed, and thereupon a day having been duly appointed by this court, to wit: the 25th day of January, 1858, for the settlement of said account and for hearing the proofs and allegations of said party.

On which day, at the time and place named in said order, said administrator appeared in person and by J. A. McDougall, Esq., his attorney, and due proof was made to the satisfaction of this court and filed herein, that notice of the settlement of said account had been given by the clerk of this court by causing notices to be posted in three public places in the said county, on the day of filing said account, setting forth the name of this estate and of the administrator, and of the day appointed by this court for the settlement of said account, the same being a day of term of this court.

And also appeared S. H. Brodie, Esq., duly appointed by this court to represent the minor heirs of this estate upon said settlement.

And also appears Simon L. Jones and Edward W. Willett, creditors of said estate, by O. L. Shafter, Esq., their attorney.

And the hearing and allegations of the respective parties being adjourned to this day by order of the court duly entered upon the minutes thereof.

And now upon this first day of February, 1858, the said matters coming on for final settlement, and the report of James D. Thornton, Esq., the auditor to whom was referred said account, being filed, showing that said account is correct and fully sustained by proper and legal vouchers on file, and no exceptions having been filed to the same, and a full investigation of the said administration having been made before the court, and all the parties interested being heard, and the court having duly considered the matter of said final account and the proceedings of the administration.

And it appearing to this court from the showing and the proofs, as follows, to wit:

That the said administrator in his account has duly charged himself with the whole of the estate of the deceased which has come to his possession at the value of the appraisement contained in the inventory, and also with all the increase, profit and income thereof, and that he has accounted for and explained, to the satisfaction of this court, all losses by the decrease or destruction of any part of the estate, and by uncollected debts, showing that he is not responsible, and that the same are without his fault;

That the requisite notice to creditors, in proper form, was duly published as directed by the order of this court, immediately after his appointment, and that all the proceedings in the administration have been concluded fairly and justly and in accordance with the provisions of the statute regulating the same, and the said administrator has not in any manner mismanaged nor wasted the said estate, and that all the proceedings necessary to a final settlement of said estate have been had,

That the said administrator has paid debts of the 1st and 2d classes, to wit: the funeral expenses, the expenses of the last sickness, and the allowance made to the family of the deceased and all the necessary expenses of administration up to this time:

That there are no debts or claims established against said estate of the 3d class, to wit: debts having a preference by the laws of the United States, and that there is a sufficient amount of money in his hands to pay such debts of the fourth class, to wit, judgments rendered against said deceased in his lifetime, and mortgages in the order of their date, as are established to be preferred claims:

That there are three mortgage claims which were a lien upon one and the same tract of land, of different dates; which said land has been sold in due course of administration, and has realized a sum sufficient for the payment in full of the first of said mortgages, the same being for the sum of \$5,000, due to E. H. Washburn, and for the payment of one-half of the second mortgage, the same being for \$4,000, and due to Henry S. Austin; and that the said mortgage claims have been duly presented and approved and filed as established debts;

That after the payment of the said judgments and said first mortgage and the one-half of the second mortgage, there will not be sufficient funds in the hands of said administrator to pay in full debts of the 5th class, to wit: all other demands against the estate, which with the said unpaid half of said second mortgage and with said third mortgage, amount to the sum of \$37,898.50, but that the said remaining assets are sufficient to pay a dividend



of sixty-two and one-third per centum of said claims, together with the remaining expenses of administration,

Now therefore, it is hereby ordered, adjudged and decreed, that the said account of said administrator be and the same is hereby fully and in all respects allowed and confirmed.

And it is further ordered, that after paying the remaining expenses of administration, which consist of the commissions of said administrator, as estimated in his said account, the fees of the said auditor and the guardian *ad litem*, which are hereby fixed at fifty dollars each, and the costs of court which have been ascertained and taxed at thirty-two dollars and fifty cents., the said administrator do pay the whole amount due on said first mortgage, and the one-half of the amount of said second mortgage, and upon the remaining debts, being the 5th class as above set forth, he pay the remaining funds in his hands, the same constituting a *pro rata* dividend of sixty-two and one-third per centum, upon the said claims respectively, according to their several amounts, as set forth in the said account, a full list of which said debts and the respective sums to be paid thereon, is as follows :

*[Here follows a list of such debts and the dividends.]*

And it is further ordered, adjudged and decreed, that upon the payment of the said several sums herein above ordered, and upon filing due and proper vouchers thereof in this court, that said administrator shall be entitled to a full and final order of discharge, and that his sureties shall thereupon and thenceforth be discharged from all liability for the future acts of said administrator.

Let the above order be entered.

T. W. FREELON, Probate Judge.

#### *Decree of Distribution.*

In the Probate Court in and for the County of San Francisco, State of California :

In the matter of the Estate of }  
George Perkins, deceased. }

The administrator, Richard Perkins, having presented and filed on the 29th day of October, A. D. 1855, his final account, and prayed for its settlement, and the said account, after due notice given, having come up for examination and settlement, and the same having been referred to Alexander Campbell, Esq., to examine and report thereon, and the referee having reported, that the account should be allowed as presented, and the said report having been, on the 26th day of November, A. D. 1855, by

an order of the court confirmed, and the said final account allowed and settled.

And the said administrator having prayed, that upon the settlement of his account, an order should be granted, pursuant to the statute, for all persons interested in the estate to appear and show cause why a distribution of said estate, without partition, should not be made to the heirs of said estate, and the said administrator having represented, and the said referee having reported, that the heirs, and only heirs, of the said estate, were the said Richard Perkins, administrator as aforesaid, and his brother, Abijah C. Perkins, of Boston, in the Commonwealth of Massachusetts, and the said Richard Perkins having a full power of attorney from the said Abijah C. to represent him, the said Abijah, and in all matters connected with said estate, to act for him as fully as he could do for himself if present, a copy of which power of attorney the said Richard has placed on file in this court.

And the court having, on the 26th day of November, A. D. 1855, pursuant to said prayer of the administrator, ordered that all persons interested in the estate of George Perkins, deceased, late of Boston, in the Commonwealth of Massachusetts, and of China, be and appear in the city of San Francisco, at the court room, in the City Hall, of the Probate Court, within and for the county of San Francisco, State of California, on the 31st day of December, A. D. 1855, at the opening of the court on that day, or as soon thereafter as counsel can be heard, to show cause, if any they can, why the estate of George Perkins should not be distributed without partition to his heirs, and to Richard Perkins and Abijah C. Perkins as such heirs; and the court having further ordered, that a notice be published in the *Daily Alta California*, a daily newspaper of the city of San Francisco, for the space of four successive weeks, the last insertion being prior to the said 31st day of December, A. D. 1855, to all persons interested in the estate of George Perkins, deceased, late of Boston, Commonwealth of Massachusetts, and of China, to be and appear in the city of San Francisco, in the court room, in the City Hall, of the Probate Court, within and for the county of San Francisco, state of California, on the 31st day of December, A. D. 1855, at the opening of the court on that day, or as soon thereafter as counsel can be heard, to show cause, if any they have, why the estate of George Perkins should not be distributed without partition, to his heirs, and to Richard Perkins and Abijah C. Perkins, according to the petition of Richard Perkins, administrator, on file.

Now, on this 31st day of December, 1855, the administrator having filed a copy of the said notice ordered to be published,

with the affidavit of the printer of the *Daily Alta California* thereto attached, that the same has been published daily in said paper for the space of at least four successive weeks, the first insertion being on the twenty-seventh day of November, A. D. 1855, and the last on the twenty-seventh day of December, A. D. 1855, and it being satisfactorily proven to the court, that George Perkins, deceased, died leaving neither father nor mother, nor wife, nor sister, nor issue, nor children of a deceased sister, nor children of a deceased brother; that he died leaving only two brothers, viz.: Abijah C. Perkins, of Boston, in the commonwealth of Massachusetts, and Richard Perkins (of said Boston) now at San Francisco, in the state of California, and it being made to appear that the said Abijah C. and Richard are the heirs, and the only heirs, of the estate of said George Perkins, deceased; and the said Richard Perkins appearing in court, and for himself as well as for his brother Abijah C., agreeing thereto, and no one appearing in opposition,

It is ordered, that the prayer of Richard Perkins, administrator, for the distribution of the estate of George Perkins, without partition, to the said Richard Perkins and Abijah C. Perkins be, and the same is hereby granted;

And it is therefore adjudged and decreed, that the said Abijah C. Perkins, of Boston, in the commonwealth of Massachusetts, and Richard Perkins (of the same place) now at San Francisco, state of California, be, and they hereby are, seized of and entitled to the lands, tenements and hereditaments in the state of California, and the appurtenances thereof as tenants in common thereof, in fee simple, holding share and share alike, belonging to the estate of George Perkins, deceased, late of said Boston and China, or to which he had any right, title, or interest, whether the same may stand in the name of said George Perkins or in the name of the said administrator, or be held in the names of others in trust for the said George Perkins, or his estate.

And it is further adjudged and decreed, that all moneys, all accounts, bills, promissory notes, and every evidence of indebtedness, together with all mortgages and securities of whatever nature, belonging to the estate of said George Perkins, be, and the same hereby are assigned, transferred, set over and delivered to said Abijah C. Perkins and Richard Perkins, in full ownership and property, share and share alike.

Any suits now pending in the name of the administrator may be prosecuted in his name, with his consent, but at the proper cost of said Abijah C. and Richard.

Dated, San Francisco, this thirty-first day of December, A. D. 1855.

T. W. FREELON, County Judge.

*Petition for a Decree of Partition.*

Probate Court, City and County of San Francisco.

In the matter of the estate of }

Antonio Hall, deceased. }

To the Honorable the Probate Court of the City and County of San Francisco :

The petition of Oliver Hall, James Hall and Noah Hall, respectfully sheweth: that by the decree of distribution of this honorable court, made herein on the 25th day of January, 1858, the estate, real and personal of the said Antonio Hall, deceased, was assigned to your petitioners and others, heirs at law of said deceased, the proportion or parts of each, being named therein respectively, according to their several rights of inheritance, but that said estate so assigned is in common and undivided, and the respective shares of said heirs are not separated and distinguished; wherefore your petitioners pray that partition and distribution of said property so assigned as aforesaid may be made, and that the respective shares of your petitioners and of each of them, and of such others of the heirs of said deceased as may desire, or of all of them, if the same be necessary, for the purposes of the application of these petitioners, may be separated and set off to them respectively, in the proportions and to the persons named in said decree as the heirs at law of said deceased, reference to which decree, the same being on file in this court, is made as a part of this petition; and that a day may be appointed for hearing this application, and that notice thereof may be given to all persons interested in said estate residing in the state of California, or their guardians, and to agents, attorneys or guardians, if there be any in this state, of such interested persons as reside out of this state, and that this court will direct whether such notice shall be given personally or by publication, and that some discreet person may be appointed to act as agent in this matter for such of said interested parties as reside out of this state who have no agents, attorney or guardians in this state. And your petitioners will ever pray, &c.

OLIVER HALL.

JAMES HALL.

NOAH HALL.

By JOHN SATTERLEE, their attorney.

*Order of Settlement of Estate and Discharge of Executor.*

In the Probate Court of the City and County of San Francisco,  
State of California.

In the matter of the Last Will and Testament }  
of Elizabeth Sullivan, deceased. }

An order having been made, to wit, on the twenty-ninth day

of October, in the year of our Lord one thousand eight hundred and fifty-five, directing distribution of the assets of the estate of Elizabeth Sullivan, deceased, among the legatees and devisees named in the will of said deceased, and the persons entitled thereto, as shown by and set forth in said order; and it being now at this day shown, that Eugene L. Sullivan, the executor of said last will and testament, has fully and faithfully discharged the duties of his trust, and has filed proper and true vouchers with the clerk of this court, showing a strict compliance with the terms of said order, and that he has distributed the whole of said estate then remaining in his hands, as thereby directed, and that no other assets have since come into his possession or knowledge, belonging thereto.

On motion of Messrs. Saunders and Hepburn, of counsel for said executor,

It is by the court, ordered, adjudged and decreed, and the court does hereby order, adjudge and decree that the said Eugene L. Sullivan, executor of the said last will and testament, has fully and faithfully discharged the duties of his trust, as shown by his final accounts now on file, and has, as shown by the vouchers on file, fully complied with the order hereinbefore referred to, making distribution of said estate: and he the said Eugene L. Sullivan is hereby wholly and absolutely discharged from all further duties and responsibilities as such executor; and the said estate declared fully distributed, and the trust settled and closed.

T. W. FREELON, County Judge.

San Francisco, June 9th, 1856.

#### FORMS UNDER GUARDIAN ACT.

##### *Petition for Appointment of Guardian.*

To the Honorable Thomas W. Freelon, Probate Judge for the County of San Francisco:

Your petitioner, Montgomery Blair, respectfully represents, that Catherine A. Young, Mary A. Young and Albert Young, infant children of Alexander H. Young, and his deceased wife, Serena Young, are entitled to certain real estate situate in the counties of San Francisco, Alameda and Santa Cruz, in the state of California, and that said infants are all under the age of fourteen years, and reside in the District of Columbia, and are not now and never were, residents of the state of California. Your petitioner further states that the said Alexander H. Young, the father of said infants, also resides in the District of Columbia, and is jointly interested with his said children as tenant in common of the property aforesaid; and has authorized your petitioner by

letter of attorney, duly signed and delivered, to take such steps as may be necessary to protect the interests of his said children in the property aforesaid. Your petitioner further represents that in his opinion it is important to the interests of said infants that a guardian be appointed for them by this honorable court, to take charge of the said estate, and protect their rights in the same. Wherefore, as the friend of said infants, thereunto duly authorized by their father, your petitioner prays your honor to appoint a guardian for them, and respectfully suggests the name of Lloyd Tevis, as a fit and proper person for said trust.

Sworn to, &c.

M. BLAIR.

*Petition for Appointment of Guardian.*

To the Honorable T. W. Freelon, County Judge, having charge of the probate business in the County of San Francisco:

Your petitioner, Maria J. Slack, a resident of San Francisco, respectfully represents, that Kate Agnes Kline is her daughter, aged four years next July, and has some property, consisting of a house and lot in Sacramento city, worth about seven hundred and fifty dollars, which needs some care and attention which cannot be bestowed without a legal guardianship. She therefore prays that she may be appointed guardian of her said child, Kate Agnes Kline, and have care and control of the property and custody of her person. And as, &c. MARIA J. SLACK.

State of California, }  
City and County of San Francisco. }

Maria J. Slack, being duly sworn, says that she has read the foregoing petition and knows the contents thereof, that the same are true of her own knowledge. MARIA J. SLACK.

Subscribed and sworn before me, this 20th of March, 1858.

D. P. BELKNAP, Deputy Clerk.

*Order Appointing Guardian.*

In Probate Court, City and County of San Francisco.

In the matter of the Estate and Guardianship }  
of Kate Agnes Kline, minor. }

On reading and filing the petition, duly verified, of Maria J. Slack, praying to be appointed guardian of Kate Agnes Kline, a minor, and the said Maria J. Slack having executed and filed a bond to the said minor in the sum of five hundred dollars, conditioned according to law, with sufficient sureties and approved by the judge of this court, she is appointed guardian of the person and estate of said Kate Agnes Kline, a minor.

T. W. FREELON, Probate Judge.

*Letters of Guardianship.*

In Probate Court.

State of California, }  
County of San Francisco, }

Maria J. Slack is hereby appointed guardian of the person and estate of Kate Agnes Kline, a minor.

Witness, William Duer, clerk of the Probate Court of the [L. s.] county of San Francisco, with the seal of said court affixed, this 23d day of March, A. D. 1858.

By order of the court, WILLIAM DUER, Clerk.

State of California, }  
City and County of San Francisco, } ss:

I do solemnly swear that I will support the constitution of the United States and the constitution of the state of California, that I will faithfully discharge the duties of the person and estate of Kate Agnes Kline, a minor, according to law.

MARIA J. SLACK.

Sworn and subscribed to before me, }  
this 23d day of March, A. D. 1858. }

D. P. BELKNAP, Deputy Clerk.

*Guardian's Bond.*

Know all men by these presents, that we, Maria J. Slack, William Vosburgh and S. A. Prescho, are held and firmly bound unto Kate Agnes Kline, a minor, in the sum of five hundred dollars, lawful money of the United States of America, to be paid to the said Kate Agnes Kline, minor, for which payment well and truly to be made, we bind ourselves, our executors, administrators and assigns, jointly and severally and firmly by these presents.

Sealed with our seals and dated this twenty-second day of March, 1858.

The condition of the above obligation is such that, whereas application has been made to the judge of the Probate Court of the city and county of San Francisco, state of California, for the appointment of Maria J. Slack, guardian of the person and estate of the said Kate Agnes Kline.

Now therefore, if the said Mary J. Slack be appointed such guardian, and shall faithfully perform the duties of her trust according to law, and shall:

- 1st. Make a true inventory of all the estate, real and personal, of her said ward, that shall come to her possession or knowledge, and shall return the same within such time as the judge shall order.
- 2d. Shall dispose of and manage all such estate according to law

and for the best interest of said ward, and faithfully discharge her trust in relation thereto; and also in relation to the care, custody and education of said ward.

3d. Shall render an account on oath of the property, estate and moneys of said ward in her hands; and all proceeds or interests derived therefrom, and of the management and disposition of the same within one year after her appointment, and at such other times as the court shall direct; and

4th. At the expiration of her trust shall settle her accounts with the probate judge or with the said ward if she be of full age, or her legal representatives; and shall pay over and deliver all the estate, moneys and effects remaining in her hands, or due from her on such settlement to the person or persons who shall be lawfully entitled thereto.

Then this obligation shall be void and of no effect, else to remain of full force and virtue.

M. J. SLACK. [L. s.]

WILLIAM VOSBURGH. [L. s.]

S. A. PRESNO. [L. s.]

Sealed and delivered in the presence of }  
D. P. BELKNAP.

State of California, }  
City and County of San Francisco, } ss.

William Vosburgh and S. A. Presno, being duly sworn, each for himself says, that he is a freeholder resident in said state, and is worth the said sum of five hundred dollars over and above all his just debts and liabilities, exclusive of property exempt from execution.

WILLIAM VOSBURGH.

S. A. PRESNO.

Sworn to before me, this 22d day of March, 1858.

D. P. BELKNAP, Deputy Clerk of the Probate Court.

*Petition for Order of Sale of Real Estate by Guardian.*

In the Probate Court, City and County of San Francisco:

In the matter of the Estate and Guardian-  
ship of Alonzo Field, a minor. }

The petition of Thomas Cole, Jr., guardian of the above-named minor, respectfully sheweth to this court,

That the estate of said minor consists almost wholly of real estate, the most of which is unproductive, and yields little or no income for the maintenance and education of said minor.

That said real estate consists, &c., &c.

*[Here follows description of property.]*

And by selling the same, a sufficient sum could be realized to



make an investment that would furnish a sufficient income for the purposes above mentioned.

That said minor has no other means of maintenance and education, and it becomes necessary therefor to make a sale of some part of said real estate.

Your petitioner would further represent that said land being wholly unproductive, it would be greatly for the benefit of said minor if the whole were sold, and the proceeds, after providing for the wants of the minor as above stated, be invested in some safe securities from which an accruing interest and profit could be derived.

Wherefore, your petitioner prays, that an order may be made, directed to the next of kin of the said minor, and to persons interested in the estate, to be and appear before this court, at such time as the court may appoint, to show cause why an order should not be granted for the sale of said real estate; and that upon such hearing, this honorable court may order said land or such part thereof as may be for the best interest of said minor, to be sold for the purposes above mentioned.

And your petitioner will ever pray, &c.

Sworn to, &c.

THOMAS COLE, Jr.

*Order to Show Cause and to Make Publication.*

[*Title of Estate and Court as in the foregoing.*]

On reading and filing the petition of Thomas Cole, Jr., praying for a sale of real estate, and it appearing therefrom, that a sale of the whole or of some portion of the real estate of said minor would be for his benefit, and is necessary,

It is hereby ordered, that the next of kin of said minor, and all persons interested in said estate, appear before this court, at the court-room thereof, at the city-hall, in the city and county of San Francisco, on Monday, the 7th day of June, 1858, at 11 o'clock A. M., then and there to show cause why an order should not be granted for the sale of such real estate, and let a copy of this order be published twice a week for three weeks successively, before the said day appointed, in the *Daily San Francisco Times*, a newspaper printed and published in said city and county of San Francisco.

May 3d, 1858.

M. O. BLAKE, Probate Judge.

*Order of Sale of Real Estate.*

Probate Court, City and County of San Francisco:

In the matter of the Estate and Guar-  
dianship of Henry L. Moore and }  
Maria Moore, minors. }

Benjamin Brewster, guardian of the above-named minors, having heretofore presented to the Probate Court of the city and county of San Francisco, his petition for authority to sell the real estate in the state of California in which said minors are interested, for the immediate relief of said minors, they being in poor and needy circumstances and without the means of maintenance and education, and said real estate being in litigation; and the said Probate Court having upon such petition made an order directing the next of kin of said minors and all persons interested in said estate, to appear before said Probate Court, at the court-room thereof at the city-hall, in the city and county of San Francisco, on Monday, the 21st day of June, 1858, at 11 o'clock A. M., then and there to show cause why an order should not be granted for the sale of said real estate; Now on this 21st day of June, 1858, on reading and filing satisfactory proof by affidavit, of the publication of said order, and the said guardian, Benjamin Brewster, having appeared by his attorney, E. D. Sawyer, and the proper proceedings having been thereupon had (no one appearing to oppose the application), and the Probate Court upon due examination being satisfied, after a full hearing upon the said petition, that a sale of the whole of the property mentioned in the said petition is necessary to be made for the maintenance and support of said minors,

It is ordered by the court, that the said Benjamin Brewster; guardian as aforesaid, do sell the right, title and interest of said minors of, in and to the following described real estate, for the support and maintenance of said minors, that is to say:

*[Here follows description of property.]*

And it is further ordered, that the said sale be made at public auction, according to law, and that it be made for cash, and that the said guardian do make return of said sale to this court, according to law.

M. C. BLAKE, Probate Judge.

*Order allowing Guardian's Account.*

In the Probate Court of the County of San Francisco:

In the matter of the Estate and }  
Guardianship of }  
Mary Evelina Brunell, an infant. }

On reading and filing the account of Orson A. Reynolds, guardian of Mary Evelina Brunell, an infant, filed in this court

the twenty-third day of October, A. D. eighteen hundred and fifty-six; and also on filing the vouchers appertaining thereto; and also on filing the notice required by law to be given of the settlement of said account with due proof of publication or posting, as required by law; and the matter of said accounting coming on to be heard on the third day of October, A. D. eighteen hundred and fifty-six, and no one appearing to oppose; and the said account and vouchers having been duly examined by this court and found to be correct and reasonable, for the interests of said infant;

And on motion of Messrs. Jones, Doyle, Barber & Boyd, of counsel for said guardian,

It is ordered that the said account of the said Orson A. Reynolds, guardian of the said infant, be and the same is hereby passed, approved and allowed, as tendered by him;

And it is hereby further ordered that the said guardian be allowed the commissions charged by him in said account, as and for his compensation.

Dated San Francisco, November 10th, 1858.

T. W. FREELON, Probate Judge.

*Bond by Guardian on the Sale of Real Estate.*

Know all men by these presents: That we, Charles Lumbard, principal, and William A. Yates and Thomas Cole, Jr., sureties, are held and firmly bound to the Probate Judge of the city and county of San Francisco, in the sum of five thousand dollars, lawful money of the United States of America, for the payment whereof well and truly to be made, we bind ourselves, our heirs, executors, administrators or assigns, jointly and severally, firmly by these presents.

Sealed with our seals, and dated this 30th day of June, 1858.

The condition of the above obligation is such, that whereas an order has been made by the Probate Court of the city and county of San Francisco, authorizing the above-named principal, as guardian of the person and estate of Sarah Morey, a minor, to sell certain real estate, the property of said minor, and bond in the sum above named has been ordered.

Now, therefore, if the said Charles Lumbard, as such guardian, shall sell the said real estate in the manner prescribed by law for sales of real estate by executors and administrators, and shall account for and dispose of the proceeds of the sale or sales thereof in the manner provided by law, then this obligation to be void, otherwise to remain in full force and effect.

Sealed and delivered	}	CHARLES LUMBARD.	[L. S.]
in presence of		WILLIAM A. YATES.	[L. S.]
TEMPLE EMMETT.		THOMAS COLE, JR.	[L. S.]

State of California, City and County }  
of San Francisco, } ss:

Thomas Cole, Jr., and William A. Yates, being duly sworn, each for himself says, that he is a freeholder resident in this state, and is worth the said sum of five thousand dollars over and above all his just debts and liabilities, exclusive of property exempt from execution.

Sworn to before me, this 30th }  
day of June, 1858. }

WILLIAM A. YATES.  
THOMAS COLE, Jr.

D. P. BELKNAP,

Deputy Clerk of the Probate Court.

[*Endorsed.*]

The within bond and sureties approved by me, this 30th day  
of June, 1858. M. C. BLAKE, Probate Judge.

## CHAPTER XIX.

## FOREIGNERS.

THE rights of foreigners, as to property and their admission to citizenship, are considered in this chapter. The former are provided for under the laws of California, the latter are governed by the legislation of the United States only.

The constitution of California provides, that foreigners who are, or who may hereafter become *bona fide*, residents of this state, shall enjoy the same rights, in respect to the possession, enjoyment and inheritance of property, as native citizens.<sup>1</sup>

The statute of 1856 provides, that aliens or foreigners may inherit, and hold by inheritance, real and personal estate, in as full a manner as though they were native-born citizens of this or the United States, but if they are non-residents at the time of inheriting any real estate, and do not become residents in five years, the real estate is sold, and the proceeds are paid into the state treasury for their benefit, and if not claimed for five years thereafter, such proceeds escheat to the state. This statute has been adjudicated by the Supreme Court, and is declared to be in harmony with the constitutional provision.<sup>2</sup>

The political rights and position of the people inhabiting California at the period of its acquisition are defined by the treaty as follows :

ARTICLE VII. Mexicans now established in territories previously belonging to Mexico, and which remain for the future within the limits of the United States, as defined by the present treaty, shall be free to continue where they now reside, or to remove at any time to the Mexican Republic, retaining the property which they possess in the said territories, or disposing thereof, and removing the proceeds wherever they please, without their being

<sup>1</sup> Const. art. I. § 17.

<sup>2</sup> Wood's Dig. art. 2866; State of Cal. v. Rogers, April Term, 1869.

subjected, on this account, to any contribution, tax or charge whatever.

Those who shall prefer to remain in the said territories may either retain the title and rights of Mexican citizens, or acquire those of citizens of the United States. But they shall be under the obligation to make their election within one year from the date of the exchange of ratifications of this treaty; and those who shall remain in the said territories after the expiration of that year, without having declared their intention to retain the character of Mexicans, shall be considered to have elected to become citizens of the United States.

In the said territories property of every kind, now belonging to Mexicans not established there, shall be inviolably respected. The present owners, the heirs of these, and all Mexicans who may hereafter acquire said property by contract, shall enjoy, with respect to it, guarantees equally ample as if the same belonged to citizens of the United States.

ARTICLE IX. The Mexicans, who, in the territories aforesaid, shall not preserve the character of citizens of the Mexican Republic, conformably with what is stipulated in the preceding article, shall be incorporated into the Union of the United States, and be admitted at the proper time (to be judged of by the Congress of the United States), to the enjoyment of all the rights of citizens of the United States, according to the principles of the constitution; and in the mean time shall be maintained and protected in the free enjoyment of their liberty and property, and secured in the free exercise of their religion, without restriction.

The constitution of California, Article II., Section 1, extends the right of popular suffrage to such white male citizens of Mexico as elected to become citizens of the United States, under the treaty.

For laws regulating the rights of foreigners in the mines, see chapters on MINING RIGHTS and TAXES.

#### NATURALIZATION.

An alien, or foreigner, being a free white person, who has resided five years in the United States and one year in the state, whose country is not at the time at war with the United States,

may be naturalized, provided he has declared his intention two years previously to become a citizen of the United States; upon establishing, to the satisfaction of the court, the above facts, as to his term of residence, and also, that during that time he has behaved as a man of good moral character, attached to the principles of the constitution of the United States, and well disposed to the good order and happiness of the same; and upon taking the oath that he will support the constitution and renounce his former allegiance.<sup>1</sup>

The declaration of intention may be made on oath or affirmation, before a circuit or district court of the United States, or any state court having common law jurisdiction, and a seal, and a clerk, or prothonotary; or before the clerk of either of such courts. It must declare that it is *bona fide* his intention to become a citizen of the United States, and to renounce forever all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty whatever, and particularly, by name, the prince, potentate, or sovereignty whereof such alien may at the time be a citizen or subject.<sup>2</sup>

In the state of California, the proper state courts are the district courts, it being held that the Supreme Court has only appellate jurisdiction, and that the other courts of the state have only statutory and not common law jurisdiction.<sup>3</sup>

In every case if the applicant shall have borne any hereditary title or order of nobility, he must expressly renounce the same.<sup>4</sup>

When the applicant was a minor of eighteen years or less at the time of his arrival in the United States, he may be naturalized without having made the declaration two years previously, *provided* he has lived in the United States five years, including the three years of his minority, and at least one year in the state or territory where the court is held, and at the time of his admission shall make the declaration of intention; and shall further declare on oath, and prove to the satisfaction of the court that, for three years next preceding, it has been *bona fide* his intention to become a citizen; and shall, in all other respects, comply with the naturalization laws.<sup>4</sup>

<sup>1</sup> Acts U. S. 1802 and 1894.

<sup>2</sup> 5 Cal. 800.

<sup>3</sup> Acts U. S. 1802.

<sup>4</sup> Act U. S. May 26, 1854, § 1.

If an alien who shall have regularly declared his intention to become a citizen, die before he is actually naturalized, his widow and children will be deemed citizens upon taking the oath prescribed by law.<sup>1</sup>

A married woman who is an alien may be naturalized.

It is also provided, that children of persons duly naturalized under the laws of the United States, being under the age of twenty-one years at the time of their parents being naturalized, shall, if dwelling in the United States, be considered as citizens. And that children of citizens, though born out of the United States, shall be deemed citizens; but the right of citizenship shall not descend to persons whose fathers have never resided within the United States.<sup>2</sup>

Provision is also made in reference to persons, and the children of persons, residing in the United States at an early period, when the naturalization laws were not fully established.

#### FORMS.

##### *Declaration of Intention.*

United States of America, }  
State of California. }

District Court of the Twelfth Judicial District of the State of California, in and for the City and County of San Francisco:

I, Pierre Martin, do declare on oath, that it is *bona fide* my intention to become a citizen of the United States of America, and to renounce forever all allegiance and fidelity to all and any foreign prince, potentate, state and sovereignty whatsoever: and particularly to Louis Napoleon III., Emperor of France, of whom I am a subject.

PIERRE MARTIN.

Sworn in open court, this first }  
day of June, 1857, before me, }

THOMAS HAYES, Clerk.

City and County of San Francisco, ss:

I, Thomas Hayes, Clerk of the District Court of the twelfth judicial district of the state of California, in and for the city and county of San Francisco, being a court of record, having common law jurisdiction, and a clerk and seal, do certify that the

<sup>1</sup> Act U. S. March 24, 1804, § 2.

<sup>2</sup> 20 Wend. 396.

<sup>3</sup> Act U. S. April 14, 1802, § 4; 6 Cranch, 177.



above is a true copy of the original declaration of intention of Pierre Martin, on his application to become a citizen of the United States, remaining in my office, upon the records of said court.

In testimony whereof, the seal of said court is hereunto affixed, this first day of June, in the year of our Lord  
[L. S.] one thousand eight hundred and fifty-seven, in the year of our independence the eighty-first.

THOMAS HAYES, Clerk.

By JOHN C. CORBETT, Deputy Clerk.

*Oath to Support the Constitution, &c.*

I, C. D., do solemnly swear, that I will support the Constitution of the United States, and that I do absolutely and entirely renounce and abjure all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty, whatever, and particularly to Louis Napoleon, Emperor of France.

C. D.

Sworn, &c.

*Proof of Residence, Good Behavior, &c.*

State of California, City and }  
County of San Francisco, } ss :

E. F., of said county, being duly sworn, doth depose and say, that he is a citizen of the United States; that he is well acquainted with the above-named C. D.; and that the said C. D. has resided within the limits, and under the jurisdiction of the United States, for five years last past, and, for one year last past, within the state of California; and that during the same period he has behaved himself as a man of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the same. And he further saith, that, at the time the said C. D. arrived in the United States, he had not attained his eighteenth year.

Sworn, &c.

E. F.

*Certificate of Citizenship.*

United States of America; }  
State of California, } ss : No.  
City and County of San Francisco, }

Be it remembered, that on the tenth day of June, in the year of our Lord one thousand eight hundred and fifty-nine, Pierre Martin, formerly of Paris, in the empire of France, at present of the state of California, aforesaid, appeared in the District Court

of the twelfth judicial district, of the state of California, in and for the city and county of San Francisco, the said court being a court of record, having common law jurisdiction, and a clerk and seal, and applied to the said court to be admitted to become a citizen of the United States of America, pursuant to the directions and requisitions of the act of Congress of the United States of America, entitled "An Act to establish an Uniform Rule of Naturalization, and to repeal the acts heretofore passed on that subject," and of the several acts in relation thereto :

And the said Pierre Martin, having thereupon produced to the court such evidence, made such declaration and renunciation, and taken such oaths, as are by the said acts required : thereupon it was ordered by the said District Court that the said Pierre Martin be admitted, and he was accordingly admitted, by said court to be a citizen of the United States of America.

Attest,

WILLIAM DUER, Clerk.

By JAS. B. McMINN, Deputy Clerk.

Signature, PIERRE MARTIN.

City and County of San Francisco, ss :

I, William Duer, clerk of the District Court of the twelfth judicial district of the state of California, in and for the city and county of San Francisco, being a court of record, having common law jurisdiction, and a clerk and seal, do certify that the above is a true copy of the original certificate of citizenship, to Pierre Martin, on his application to become a citizen of the United States, remaining in my office, upon the records of said court.

In testimony whereof, the seal of said court is hereunto  
[L. s.] affixed, this tenth day of June, in the year of our Lord  
one thousand eight hundred and fifty-nine, in the year  
of our independence the eighty-third.

*Per Curiam,*

WILLIAM DUER, Clerk.

By WM. R. SATTERLEE, Deputy Clerk.

*Declaration of Intention to become a Citizen for Three Years  
past.*

I, M. N., do declare, on oath, that it is *bona fide* my intention, and has been for the last three years, to become a citizen of the United States, and to renounce forever all allegiance to all and every foreign prince, potentate, state, and sovereignty, whatever, and particularly to Victoria, Queen of Great Britain and Ireland.

Sworn, &c.

M. N.

State of California, } ss:  
City and County of San Francisco, }  
In the matter of M. N., on his naturalization.

Sworn in open court, this                      day of }  
of                      , 18                      , before me, J. C., }

Clerk of the District Court of the Northern District of California.

## CHAPTER XX.

## HOMESTEAD.

THE constitution declares, that the legislature shall protect by law, from forced sale, a certain portion of the homestead and other property of all heads of families.

In pursuance of this provision, the legislature have passed the following statute:

ACT OF APRIL 21, 1851, TO EXEMPT THE HOMESTEAD AND OTHER PROPERTY FROM FORCED SALES IN CERTAIN CASES.

SECTION 1. The homestead, consisting of a quantity of land, together with the dwelling-house thereon and its appurtenances, not exceeding in value the sum of five thousand dollars, to be selected by the owner thereof, shall not be subject to forced sale on execution or on any other final process from a court, for any debt or liability contracted or incurred after thirty days from the passage of this act, or if contracted or incurred at any time in any other place than in this state.

SEC. 2. Such exemption shall not extend to any mechanic's, laborer's or vendor's lien, or to any mortgage, lawfully obtained; but no mortgage, sale, or alienation of any kind whatever of such land by the owner thereof, if a married man, shall be valid without the signature of the wife to the same, acknowledged by her separately and apart from her husband; *provided*, that the wife be a resident of this state, and that such signature and acknowledgment shall not be necessary to the validity of the mortgage upon the land, executed before it became the homestead of the debtor, or executed to secure the payment of the purchase money.

SEC. 3. Whenever any levy shall be made upon the land or tenements of a householder, whose homestead has not been selected or set apart, such householder may notify the officer at the time of making such levy of what he regards as his home-

stead, with a description thereof, and the remainder alone shall be subject to sale under such levy.

SEC. 4. If the plaintiff in execution shall be dissatisfied with the lands and tenements selected and set apart as aforesaid, the matter shall be submitted to two appraisers, one to be selected by the plaintiff and the other by the defendant, who shall determine whether such land and tenements exceed in value the sum of five thousand dollars. If the appraisers so chosen cannot agree, they shall appoint a third person to decide between them. If they cannot agree in the choice of a third person, he shall be named by the officer.

SEC. 5. If the land selected as a homestead consist of a lot containing twenty-five hundred square yards or less, and the appraisers shall certify to the officer that such lot exceeds in value the sum of five thousand dollars, the said officer may proceed to sell such excess, or the whole, at the option of the defendant in execution, in the manner provided in other cases for the sale of real property under execution. In case the excess only is sold, then such proceeds shall be applied to the satisfaction of the execution; and in case the whole amount of the property is sold, five thousand dollars of the proceeds of such sale shall be paid to the defendant in execution, and the excess shall be applied to the satisfaction of the execution; *provided*, that no bid shall be received for a less sum than five thousand dollars.

SEC. 6. In any case where the land selected and claimed as a home shall exceed in extent twenty-five hundred square yards, and if the appraisers be of opinion that such land, together with the dwelling-house and its appurtenances, exceed in value the sum of five thousand dollars, they shall set apart a portion thereof, in a compact form, including the dwelling-house, if possible, as the homestead; such homestead shall be, as near as may be, of the value of five thousand dollars, and the said appraisers shall cause the same to be surveyed. The expenses of such survey shall be chargeable on the execution and collected thereon.

SEC. 7. After the survey shall have been made, the officer making the levy may sell the property levied upon and not included in the survey, as in cases of other sales of real estate under execution; and in giving a deed for the same he may describe it according to his original levy, excepting therefrom, by metes and

bounds, according to the certificate of survey, the quantity set apart as aforesaid.

SEC. 8. The defendant in execution, at the time of making any levy, may also designate to the officer any article of personal property as being exempt from forced sale as specified in the act to regulate proceeds in the courts of justice in this state; *provided, however*, that nothing in this section shall be so construed as to exempt over and above that provided for in title seven, chapter one, of "An Act to regulate Proceedings in Civil Cases in Courts of Justice in this State."

SEC. 9. Before proceeding to act, the appraisers mentioned in the act shall be sworn by the officer to do justice between the parties. Their decision shall be delivered to the officer, shall be returned by him with the execution, and shall be conclusive between the parties and for the protection of the officer against all liability. If the value of the real estate or personal property, as the case may be, do not exceed the amount made exempt by this act, the cost of the proceedings shall be paid by the plaintiff in execution; otherwise by the defendant.

SEC. 10. The homestead and other property exempt from forced sale, upon the death of the head of the family, shall be set apart by the Probate Court for the benefit of the surviving wife and his own legitimate children, and in case of no surviving wife or his own legitimate children, for the next heirs at law; *provided*, that the exemption as provided in this section shall not extend to unmarried persons, except when they have charge of minor brothers or sisters, or both, or brothers' or sisters' minor children, or a mother, or unmarried sisters living in the house with them.

SEC. 11. Nothing in this act shall be so construed as exempting any real or personal property from sale for taxes.

Property exempt from seizure on execution is defined by statute as follows:<sup>1</sup>

The following property shall be exempt from execution, except as herein otherwise specially provided: 1. Chairs, tables, desks and books, to the value of one hundred dollars, belonging to the judgment debtor. 2. Necessary household, table and kitchen furniture, belonging to the judgment debtor, including stove,

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<sup>1</sup> Wood's Dig. art. 958; Prac. Act, 219.

stove-pipe and stove-furniture, wearing apparel, beds, bedding and bedsteads, and provisions actually provided for individual or family use, sufficient for one month. 3. The farming utensils or implements of husbandry of the judgment debtor, also, two oxen, or two horses, or two mules, and their harness, two cows, and one cart or wagon, and food for such oxen, horses, cows or mules for one month. 4. The tools and implements of a mechanic, necessary to carry on his trade, the instruments and chests of a surgeon, physician, surveyor and dentist, necessary to the exercise of their profession, with the professional library and the law libraries of an attorney or counsellor. 5. The tent and furniture, including a table, camp-stools, and bed and bedding of a miner; also, his rocker, shovels, spades, wheelbarrows, pumps, and other instruments used in mining, with provisions necessary for his support for one month. 6. Two oxen, or two horses, or two mules, and their harness, and one cart or wagon, by the use of which a cartman, teamster or other laborer habitually earns his living, and food for such oxen, horses or mules for one month; and a horse, harness and vehicle used by a physician or surgeon in making his professional visits. 7. All fire-engines, with the carts, buckets, hose and apparatus thereto appertaining, of any fire company or department, organized under any law of this state. 8. All arms and accoutrements required by law to be kept by any person; but no article mentioned in this section shall be exempt from execution issued on a judgment recovered for its price, or upon a mortgage thereon. 9. All court-houses, jails, public offices and buildings, lots, grounds and personal property, belonging to any county of this state, and all cemeteries, public squares, parks and places, public buildings, town halls, markets, buildings appertaining to the fire departments, and the lots and grounds thereunto belonging and appertaining, owned or held by any town or incorporated city, or dedicated by such town or city to health, ornament or public use.

The following sections of the Probate Act make provision for the family<sup>1</sup>—and are found also in the statutes of *Oregon* and *Washington*:<sup>2</sup>

SECTION 120. When a person shall die, leaving a widow or a

<sup>1</sup> Wood's Dig. art. 2280-2283.

<sup>2</sup> Laws Oreg. p. 255; Laws Wash. p. 279.

minor child or children, the widow, child, or children, shall, until letters have been granted, and the inventory has been returned, be entitled to remain in possession of the homestead and of all the wearing apparel of the family, and of all the household furniture of the deceased, and shall also be entitled to a reasonable provision for their support, to be allowed by the probate judge.

SEC. 121. Upon the return of the inventory, the court shall set apart, for the use of the widow or minor child or children, all property which is by law exempt from execution, or so much of such property as may have belonged to the deceased.

SEC. 122. If the whole property exempt by law be not included in the inventory, and if the amount set apart be insufficient for the support of the widow and child or children, the probate court shall make such reasonable allowance out of the estate as shall be necessary for the maintenance of the family, according to their circumstances, during the progress of the settlement of the estate; which, in case of an insolvent estate, shall not be longer than one year after granting letters of administration.

SEC. 123. Any allowance made by the court, in accordance with the provisions of the preceding section, shall be paid by the administrator in preference to all other charges, except funeral charges, and expenses of administration.

SEC. 125. When property shall have been set apart for the use of the family in accordance with the provisions of this chapter, if the deceased shall have left a widow and no minor child, such property shall be the property of the widow. If he shall have left also a minor child or children, the one-half of such property shall belong to the widow, and the remainder to the child, or in equal shares to the children, if there be more than one. If there be no widow, the whole shall belong to the minor child or children.

SEC. 126. If, on the return of the inventory of any intestate estate, it shall appear that the value of the whole estate does not exceed the sum of five hundred dollars, the Probate Court shall, by a decree for that purpose, assign for the use and support of the widow and minor children of the intestate, or for the support of the minor child or children, if there be no widow, the whole of the estate after the payment of the funeral charges and expenses of the administration, and there shall be no further pro-



ceedings in the administration, unless further estate be discovered.

SEC. 127. If the widow has a maintenance derived from her own property equal to the portion set apart to her by the one hundred and twenty-fifth and one hundred and twenty-sixth sections of this act, the whole property so set apart shall go to the minor child or children.

The Revenue Act of April 29, 1857, provides, that the property of widows, or orphan children, to the amount of \$1,000, shall not be subject to taxation.<sup>1</sup>

#### JUDICIAL DECISIONS.

The Homestead Act does not apply to and affect property acquired *previous* to its passage.<sup>2</sup>

The "homestead" is the dwelling place of the family, where they permanently reside; and, by common law, such residence raises the presumption, that the premises so held are the homestead, and every one is bound to take notice of the character of the occupant's claim.<sup>3</sup>

Occupancy by the family is presumptive evidence of the appropriation of a place as a homestead, and is consequently notice to all the world.<sup>4</sup>

The removal of husband and wife from a homestead thus selected, after and in consequence of a sale and conveyance by the husband, in which the wife did not join, furnishes no evidence of an abandonment of the homestead by her, but seems to be the very case against which the statute intended to provide.<sup>5</sup>

As soon as a place acquires the character of a homestead, it is immaterial how the title to the property originated, whether it was the separate property of the husband, or wife, or the common property of both. It becomes a sort of joint tenancy, with the right of survivorship, as between husband and wife, and this estate cannot be altered or destroyed, except by the concurrence of both in the manner provided by law, unless it be in favor of an innocent purchaser, without notice.<sup>6</sup>

In the case of the successive occupancy of several places as

<sup>1</sup> Laws 1857, p. 326, § 2, sub. 7.

<sup>2</sup> 4 Id. 268; 6 Id. 284; 10 Id. 290.

<sup>3</sup> 4 Cal. 23; 10 Cal. 294.

residences, the recovery of any one of them by the wife, as a homestead, would bar her recovery of any other as such.<sup>1</sup>

Premises never assume the character of a homestead until actual residence thereon by the family.<sup>2</sup>

Where the wife, at the date of the execution of a mortgage thereon, was not a resident of the state, the homestead right cannot be sustained.<sup>3</sup>

The phrase "resident of this state," used in the second section of the Homestead Act, means an actual and not a constructive presence.<sup>4</sup>

To make a valid sale of the homestead requires a joint deed of the husband and wife. Separate deeds of the husband and wife are both invalid.<sup>5</sup>

A wife cannot sue alone to recover the homestead; it is a joint estate, with right of survivorship, and both husband and wife must join in the action.<sup>6</sup>

The statute does not contemplate that homesteads should be carved out of land held in joint tenancy, or by tenancy in common, because it has provided no mode for their separation and ascertainment.<sup>7</sup>

The plaintiff is entitled to make out of the lot claimed as a homestead, only the actual amount of the purchase money and interest remaining due, and for the excess over the purchase money, he must proceed on his other security, or against the party, but not against the homestead.<sup>8</sup>

A sale or alienation of the homestead property, without the signature of the wife, is void only as to the homestead value. Any excess over five thousand dollars is subject to the control of the husband, and may be disposed of in any manner by him.<sup>9</sup>

Where an action is brought to foreclose a mortgage upon property claimed as a homestead, the wife of the mortgagor is a necessary party to a full adjustment of the controversy, and should be allowed to intervene.<sup>10</sup>

A sale by a sheriff, under execution, of a house claimed as a homestead by the defendant in execution, and ascertained by

<sup>1</sup> 4 Cal. 268; 6 Id. 284; 10 Id. 298.

<sup>2</sup> 7 Id. 445; 6 Id. 623; 10 Id. 296.

<sup>3</sup> 7 Id. 68.

<sup>4</sup> 6 Id. 71.

<sup>5</sup> 5 Id. 244; 6 Id. 165; Id. 416.

<sup>6</sup> 5 Id. 458.

<sup>7</sup> 5 Id. 504; 8 Id. 68; Id. 74; 9 Id. 90; 10 Id. 298.

appraisement to be worth over five thousand dollars, should not be made until an exact appraisement of the value of the premises is obtained, so that the sheriff can convey a definite fractional undivided interest therein.<sup>1</sup>

As a husband and wife may by joining in a conveyance, destroy a homestead right already acquired, by selling the whole, so they may equally destroy it by selling an undivided portion of it.<sup>2</sup>

The constitution is inoperative in itself, and looks to legislation to determine how far and in what manner the homestead should be protected from forced sale.<sup>3</sup>

The separate property of the husband acquired before marriage, may become the homestead, as well as the common property of husband and wife.<sup>4</sup>

A mortgage of a homestead, signed by the husband alone, is absolutely void where its value does not exceed five thousand dollars. When a husband ceases to be the head of a family, the right to a homestead also ceases.<sup>5</sup>

A mortgage, void because it was upon a homestead, will not become valid, by reason of the homestead right being lost by the death of the wife of the mortgagor without children; the debt which the mortgage was intended to secure, is not impaired, but it is placed on the same level with the other debts of the mortgagor, and must be enforced in the same manner.<sup>6</sup>

Any individual, whether married or not, may be the head of a family, and as such, entitled to a homestead right. But when this relation ceases, the right also ceases.<sup>7</sup>

Where A., who is a married man, is occupying premises as the tenant of B., and concludes to purchase the same, and to do so borrows the whole of the purchase money from C., and to secure the payment thereof to C., mortgages the premises to him, but the wife does not sign the mortgage: *held*, that the homestead right was subject to the mortgage. The deed and mortgage being simultaneous, were but parts of the same transaction. It would seem, under the circumstances, that neither the husband nor his wife had either legal or equitable right to the premises.<sup>8</sup>

<sup>1</sup> 6 Cal. 487.

<sup>2</sup> 10 id. 568.

<sup>3</sup> 6 id. 625.

<sup>4</sup> 8 id. 66; 10 id. 296.

<sup>5</sup> 8 id. 271.

The homestead right is not affected by the foreclosure of a mortgage signed by the husband alone.<sup>1</sup>

The homestead being held in a sort of joint tenancy, passes, on the death of the husband, to the wife, by right of survivorship.<sup>2</sup>

No damage can result from a sale of property exempt from forced sale as a homestead. If the property sold was a homestead, the sheriff's deed conveyed nothing. The purchaser at such sale could acquire no right to the property, nor could the plaintiff suffer any injury.<sup>3</sup>

The only way in which the right of the wife to the homestead can be extinguished, is by a joint deed executed by both husband and wife, and properly acknowledged.<sup>4</sup>

In an action by the wife against the husband, for a divorce, the defendant cannot have a portion of the homestead set apart to him, where it is not shown that the property claimed as a homestead has been at any time during the existence of the marriage the residence of the family.<sup>5</sup>

The voluntary removal of the husband, with his family, is not, of itself, evidence of abandonment of the place as a homestead; much less so a removal under apprehensions for the safety of his family.<sup>6</sup>

Where commissioners were appointed by the court to select and set apart as the homestead a portion of the tract of land mortgaged, such portion to be of the value of five thousand dollars, in form as compact as possible, including the place where the dwelling-house is situated, and to report their action to the court, and the commissioners, acting under oath, made the selection, and their report was approved: *held*, that the proceeding was proper.<sup>7</sup>

#### FORMS.

##### *Petition for Homestead by an Insolvent.*

District Court, 4th Judicial District.

Frank Max, an Insolvent Debtor, }  
*against*  
 his Creditors. }

City and County of San Francisco, ss:

The petition of Frank Max, the said insolvent, respectfully.

<sup>1</sup> 9 Cal. 347.

<sup>2</sup> Id. 507.

<sup>3</sup> 10 Id. 17.

<sup>4</sup> Id. 167.

<sup>5</sup> Id. 224.

<sup>6</sup> Id. 296.

represents, that he is, and was at the time of filing his petition and schedule herein, and for a long time theretofore, has been a married man and man of family, and at and during said several times resided with his family in and upon that certain house and lot, or parcel of land, situated in the city and county of San Francisco, and bounded and described as follows, to wit: [*herein insert description,*] as his homestead, and that he claims the same as his homestead. That he purchased the same on or about the first day of April, A. D. 1857, and executed a mortgage upon the same for a part of the purchase money, to wit: the sum of three thousand dollars, which said mortgage is still wholly unpaid and in full force and virtue. That said house and lot subject to the payment of said mortgage, is reasonably worth less than the sum of five thousand dollars.

Petitioner also represents, that said house and lot is set forth in his schedule in said proceeding, and that there is also set forth in said schedule, a small lot of furniture, to wit: [*here insert description,*] valued at the sum of three hundred dollars. Also, that he is a carpenter by trade, and that his schedule contains a lot of tools, with which your petitioner carries on his said business and trade, and which are necessary thereto; all of which your petitioner is advised and verily believes he is entitled to have set apart for the use of himself and family, as property exempt by law from forced sale by execution.

Wherefore, the premises considered, your petitioner prays that the said premises be set apart as his homestead, and that said furniture and tools be also set apart for his use, and for such other relief as may be just, and so he will ever pray, &c.

Subscribed and sworn to, before me, } FRANK MAX.  
this 2d day of May, 1858.

W. BARTLETT, Dep. County Clerk.

*Order of Reference.*

District Court of the Fourth Judicial District of the State of California, in and for the City and County of San Francisco:

April Term, Tuesday, April 5, 1858.

Present, HON. JOHN S. HAGER, Judge,  
Frank Max, an Insolvent Debtor, }

*against*  
his Creditors. }

S. M. Wilson, Esq., counsel for John Smith, the opposing creditor herein, appeared in open court, and with the consent of the insolvent's counsel, withdrew the opposition of said creditor to the discharge of the insolvent. Whereupon, on motion of insolvent's counsel, it is ordered, that this cause be, and it is hereby referred to S. H. Dwinelle, Esq., to take testimony and ascertain

the value &c., of the homestead, tools, and other property claimed by the insolvent as exempt from execution and forced sale, and to report the same to this court.

*Order Setting Apart Homestead to Insolvent.*

In the District Court of the Fourth Judicial District.

Frank Max, an Insolvent Debtor, }  
   *against*  
   his Creditors. }

On motion of Messrs. McDougall and Sharp, attorneys for petitioner, and there being no opposition thereto, and it appearing to the satisfaction of the court that the property set out and described in petitioner's schedule as his homestead is the homestead of petitioner, and that he and his family reside thereupon, and it also appearing to the satisfaction of the court that the said property, together with the improvements thereon, is of less than the value of five thousand dollars,

Now, therefore, in consideration of the premises, it is ordered, adjudged and decreed, that the said real estate, together with the improvements, to wit: [*here insert description*] be separated and set apart unto the said Max and his family, as his and their homestead.

It is further ordered, adjudged and decreed, that the wearing apparel and tools mentioned and described in said petitioner's schedule, be set apart to the said petitioner and his family for his and their benefit and use.

JOHN S. HAGER, Judge.

Dated San Francisco, April 16th, 1859.

## CHAPTER XXI.

## HUSBAND AND WIFE.

THE relation of husband and wife, though having its foundation in nature, as the primary and most important of the domestic relations, is regarded by the law purely as a civil contract, and as such, in order to make it binding, it must be characterized in the main, by the same essentials requisite to the validity of other contracts. Hence the consent of parties legally competent to contract is necessary; a sufficient consideration is found in the mutuality of the contract.

The chief peculiarity which distinguishes this from other contracts is, that it continues during the lives of the parties, and cannot be dissolved by mutual consent, but only for certain specific causes, defined by law.

By the statutes of California, which follow the civil rather than the common law, the right is conferred upon the wife to hold separate property, to carry on business as a *femme sole*, to make conveyances in certain cases, and to exercise other powers, equally inconsistent with the common law theory of the nature and effect of the marriage relation, as will appear from the following summary of the statutory provisions upon the subject, together with the adjudications of the courts thereon.

The act of April 22d, 1850, regulating marriages,<sup>1</sup> provides substantially as follows:

1. Marriage is considered in law as a civil contract, to which the consent of the parties is essential.
2. All marriages between persons within certain degrees of kindred are declared to be incestuous and void.
3. All marriages of white persons with negroes or mulattoes are declared to be illegal and void.
4. Whoever shall contract marriage in fact, contrary to the two foregoing prohibitions, and whoever shall solemnize any such

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<sup>1</sup> Wood's Dig. p. 486.

marriage, shall be deemed guilty of a misdemeanor, punishable by fine, imprisonment, or both.

5. All marriages contracted without this state, which would be valid by the laws of the country in which the same were contracted, shall be valid in all courts and places within this state.

6. Judges, justices of the peace, clergymen of all denominations, and licensed preachers, may perform the marriage ceremony.

7. But no judge, &c., shall marry any male under twenty or female under eighteen years without the consent of the parent or guardian, or other person under whose care and government such minor may be. The violation of this provision is a misdemeanor punishable by fine not exceeding one thousand dollars.

8. It is provided by statute, that a record of marriages shall be kept by the person solemnizing them, and certificates transmitted to the recorder of the county in which the marriage took place, with a penalty for non-compliance.

9. It is made the duty of the recorder to record all such returns of marriages in a book kept for that purpose, for which he is to be paid a fee of one dollar in each case, by the parties to the marriage.

10. The books of record of marriages are made legal evidence, also copies of the entries therein, certified by the recorder under his official seal.

11. A punishment by fine and imprisonment is provided for making a false return of a marriage, or a return of a pretended marriage, to the recorder, or for a false record by him of any return of a marriage.

12. By the statute of April 26, 1858, as amended March 12, 1859,<sup>1</sup> it is provided, that the governor be authorized to appoint, by and with the advice and consent of the senate, a state registrar, who shall keep a record of all marriages, births, divorces, and deaths, certified to him by the recorders of the various counties of the state, and shall prepare from said record an annual report, and submit the same to the governor on the 15th December of each year.

13. By section 2 of said law (as amended), it is made the duty of all persons performing the ceremony of marriage, to file in the office of the recorder of the county in which such marriage takes

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<sup>1</sup> Laws of 1859, p. 108.



place, a certificate of the same, setting forth particulars respecting time, place, and parties. The said section further provides, that all parents, heads of families, keepers, and superintendents of prisons, alms-houses, hospitals, houses of correction, and other public and private institutions, and the commanding officer of every ship or other vessel, shall file, in like manner, in the office of the recorder of the county wherein such birth occurs, a record of every birth taking place in their families, or the institution, or vessel under their charge or supervision, according to a form prescribed in said section.

14. It is further made the duty of the clerks of all courts wherein a divorce is granted, to file in the office of the recorder of the county in which said divorce occurs, a record of the same, in the manner particularly prescribed in said section, for which entry the clerk is entitled to receive two dollars from the party procuring the divorce. The same section provides, likewise, for a similar record of all inquests and burials.

15. It is further made the duty of the clerk of every court of probate in which letters testamentary or of administration may be granted, to file in the office of the recorder of the county wherein such court may be held, the names and residence of all executors and administrators upon the estates of deceased parties, with the title of the court, and the date when such letters testamentary or of administration were issued, and he shall be entitled to tax with the costs of issuing said letters the sum of two dollars for performing such service.

16. Section third of said act as amended, provides for the payment of a fee of one dollar to the recorder on filing the record of any birth, marriage, &c., and makes the neglect to comply with the provisions of the act requiring such record, punishable by fine, imposing upon the district attorney of the county in which the case of neglect may occur, the duty of prosecuting the same to conviction.

17. Section fourth provides for the entry in suitable books of record, to be kept by the county recorder, every registry of a marriage, birth, &c., filed with him as aforesaid, and for the payment to him of a fee of one dollar and a half for each entry. It further provides, that at the end of every month, he shall certify and sign upon the face of the record, that the registrations for that

period are correctly made up; and that at the end of every three months, he shall regularly transmit a duplicate of all registrations made in his office, attested by his certificate and official seal, to the state registrar for record in his office.

18. Section five prescribes the duty of the county treasurer in regard to the moneys paid to him by the county recorder on account of registration.

19. Section six repeals all other acts or parts of acts conflicting with this act.

#### THE RIGHTS OF HUSBAND AND WIFE RESPECTING PROPERTY.

The act of April 17, 1850, "Defining the Rights of Husband and Wife,"<sup>1</sup> provides substantially as follows:

1. All property both real and personal of the wife, owned by her before marriage and that acquired afterwards, by gift, bequest, devise or descent, shall be her separate property; and all property, both real and personal, owned by the husband before marriage, and that acquired by him afterwards, by gift, bequest, devise or descent, shall be his separate property.

2. All property acquired after the marriage, by either husband or wife, except such as may be acquired by gift, bequest, devise or descent, shall be common property.

3. A full and complete inventory, of the separate property of the wife, shall be made out and signed by the wife, acknowledged or proved in the manner required by law for the acknowledgment or proof of a conveyance of land, and recorded in the office of the recorder of the county in which the parties reside.

4. If there be included in the inventory any real estate lying in other counties, the inventory shall also be recorded in such counties.

5. The filing of the inventory in the recorder's office shall be notice of the title of the wife, and all property belonging to her, included in the inventory, shall be exempt from seizure or execution for the debts of her husband.

6. By an act approved February 11, 1858, amending the sixth section of the act "Defining the Rights of Husband and Wife,"<sup>2</sup> it is provided as follows: The husband shall have the manage-

<sup>1</sup> Wood's Dig. p. 487.

<sup>2</sup> Laws of 1858, p. 22.

ment and control of the separate property of the wife during the continuance of the marriage; but no sale or other alienation of any part of such property can be made, nor any lien or incumbrance created thereon, unless by an instrument in writing, signed by the husband and wife, and acknowledged by her, upon an examination separate and apart from her husband, before any judge of a court of record or notary public; or, if executed out of this state, then so acknowledged before some judge of a court of record, or before a commissioner appointed under the authority of this state, to take acknowledgments of deeds; or before any minister, secretary of legation, or consul of the United States, appointed for and residing in the foreign country in which the said deed is to be acknowledged.

7. When any sale shall be made by the wife of any of her separate property, for the benefit of her husband, or when he shall have used the proceeds of such sale with her consent in writing, it shall be deemed a gift, and neither she nor those claiming under her shall have any right to recover the same.

8. If the wife has just cause to apprehend that her husband has mismanaged or wasted, or will mismanage or waste, her separate property, she, or any other person in her behalf, may apply to the District Court for the appointment of a trustee, to take charge of and manage her separate estate; such trustee may, for good cause shown, be from time to time removed by the court, and another appointed in his place. Before entering upon the discharge of his trust, he shall execute a bond, with sufficient surety or sureties, to be approved by the court, for the proper performance of his duties. In case of the appointment of a trustee for the wife, he shall account for and pay over to the husband and wife, or either of them, the income and profits of the wife's estate, in such manner and proportion as the court may direct.

9. The act of May 12, 1853,<sup>1</sup> amending section 9 of the act defining the rights of husband and wife, provides as follows: The husband shall have the entire management and control of the common property, with the like absolute power of disposition as of his own separate estate; and the rents and profits of the

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<sup>1</sup> Wood's Dig. p. 488.

separate estate of either husband or wife shall be deemed common property, unless in the case of the separate property of the wife, it shall be provided by the terms of the instrument whereby such property may have been bequeathed, devised, or given to her, that the rents and profits thereof shall be applied to her sole and separate use; in which case, the entire management and disposal of the rents and profits of such property shall belong to the wife, and shall not be liable for the debts of the husband.

10. No estate shall be allowed to the husband as tenant by courtesy upon the decease of his wife, nor any estate in dower be allowed to the wife upon the decease of her husband.

11. Upon the dissolution of the community by the death of either husband or wife, one-half of the common property shall go to the survivor, and the other half to the descendants of the deceased husband or wife, subject to the payment of the debts of the deceased. If there be no descendants of the deceased husband or wife, the whole shall go to the survivor, subject to such payment.

12. The act of April 14, 1857,<sup>1</sup> amending the act defining the rights of husband and wife, provides as follows: In case of the dissolution of the marriage, by decree of any court of competent jurisdiction, the common property shall be equally divided between the parties, and the court granting the decree shall make such order for the division of the common property, or the sale and equal distribution of the proceeds thereof, as the nature of the case may require; *provided*, that when such decree of divorce is rendered on the ground of adultery, or extreme cruelty, the party found guilty thereof shall only be entitled to such portion of the common property as the court granting the decree, may, in its discretion, from the facts of the case, deem just, and allow; and such allowance shall be subject to revision on appeal in all respects, including the exercise of discretion by the court below.

13. The separate property of the husband shall not be liable for the debts of the wife contracted before the marriage, but the separate property of the wife shall be and continue liable for all such debts.

14. In every marriage hereafter contracted in this state, the

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<sup>1</sup> Wood's Dig. p. 488.

rights of husband and wife shall be governed by this act, unless there is a marriage contract, containing stipulations contrary thereto.

15. The rights of husband and wife, married in this state prior to the passage of this act, or married out of this state, but who shall reside and acquire property herein, shall also be determined by the provisions of this act, with respect to such property as shall be hereafter acquired, unless so far as such provision may be in conflict with the stipulations of any marriage contract.

16. All marriage contracts shall be in writing, and executed and acknowledged or proved, in like manner as a conveyance of land is required to be executed and acknowledged or proved.

17. When a marriage contract shall be acknowledged or proved, it shall be recorded in the office of the recorder of the county in which the parties reside, and also in the office of the recorder of every county in which any real estate may be situated, which is conveyed or affected by such marriage contract.

18. When any marriage contract is deposited in the recorder's office for record, it shall, as to all property affected thereby, in the county where the same is deposited, impart full notice to all persons of the contents thereof.

19. No marriage contract shall be valid, or affect any property, except between the parties thereto, until it shall be deposited for record with the recorder of the county where the parties reside, and, if it relates to real estate in other counties, with the recorder of the county wherein such property is situated.

20. A minor, capable of contracting matrimony, may enter into a marriage contract, and the same shall be as valid as if he was of full age; *provided*, it be assented to, in writing, by the person or persons whose consent is necessary to his marriage.

21. A marriage contract may be altered at any time before the celebration of the marriage, but not afterward.

22. The parties to any marriage contract shall enter into no agreement, the object of which shall be to alter the legal order of descent, either with respect to themselves in what concerns the inheritance of their children or posterity, or with respect to their children between themselves, nor derogate from the rights given by law to the husband, as to the head of the family, or to the surviving husband or wife, as the guardian of their children.

23. No stipulation of any marriage contract shall be valid,

which shall derogate from the rights given by law to the husband, over the persons of his wife and children, or which belong to the husband, as the head of the family, or to the surviving husband or wife, as the guardian of their children.

THE RIGHT OF MARRIED WOMEN TO ACT AS SOLE TRADERS.

By the act of April 12, 1852, "to authorize married women to transact business in their own name, as sole traders,"<sup>1</sup> it is provided as follows:

1. Married women shall have the right to carry on and transact business under their own name, and on their own account, by complying with the regulations prescribed in this act.

2. Any married woman residing within this state, desirous to avail herself of the benefit of this act, shall make a declaration before a notary public, or other person authorized to take acknowledgments of deeds, that she intends to carry on business in her own name, and on her own account, specifically setting forth in her declaration, the nature of the business, trade, profession, or art; and from that date she shall be individually responsible in her own name, for all debts contracted by her on account of her said trade, business, profession or art; said declaration shall be recorded in the office of the county recorder, in the county where said business, trade, profession or art is to be carried on or practised, and also to be advertised in some public newspaper of general circulation in said county for three successive weeks, and if any newspaper be published in said county, said publication shall be made in the paper so published in said county.

3. After the declaration has been duly made and recorded, as provided in the second section of this act, the person so making her declaration as aforesaid, shall be entitled to carry on said business, trade, profession or art, in her own name, and the property, revenue, moneys, and debts and credits, so invested, shall belong exclusively to said married woman, and shall not be liable for any of the debts of her husband, and said married woman shall be allowed all the privileges, and be liable to all the legal processes now or hereafter provided by law against debtors and creditors.

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<sup>1</sup> Wood's Dig. p. 489.

4. Any married woman availing herself of the benefit of this act, shall be responsible for the maintenance of her children.

5. No married woman shall commence or carry on business on her own account, under the provisions of this act, when the amount originally invested in said business is more than five thousand dollars, unless the declaration provided for in section second, contain also a statement under oath, that the surplus of money above five thousand dollars, invested in said business, did not come from any funds belonging to her husband.

6. The husband of the wife availing herself of the benefit of this act, shall not be responsible for any debts contracted by her in the course of the said business, without the special consent of her husband, given in writing, nor shall his separate property be taken on execution, for any debts contracted by her.

#### THE POWER OF MARRIED WOMEN TO CONVEY REAL ESTATE.

By an act, passed February 14th, 1855, "to authorize married women to convey real estate held in their own right," it is provided as follows :

1. That a married woman of legal age, shall have power to convey and transfer lands, or any estate or interest therein, vested in or held by her in her own right, as fully and perfectly as she might or could do if single or unmarried ; *provided*, the husband of such married woman be not, and for one year next preceding the execution of the instrument of conveyance by the wife, has not been *bona fide* residing in this state.

2. The execution of an instrument of conveyance by a married woman, independent of her husband, as provided in the preceding section, shall be acknowledged before the district judge of the county in which the lands described in the conveyance are located, and the judge taking such acknowledgment, shall, before he certify the same, be satisfied by the oaths of at least two credible disinterested citizens of this state, that the husband of such married woman does not, and for one year next preceding the day of acknowledgment, has not resided in this state, which fact, and the names of the witnesses by whom the same was proved, shall be recited in the certificate of acknowledgment.

See chapter on ACKNOWLEDGMENTS, also, on HOMESTEAD.

In reference to the power of married women to make wills, see chapter on WILLS.

#### INSURANCE OF LIVES FOR THE BENEFIT OF MARRIED WOMEN.

By the act of May 11th, 1854, "in respect to insurance for lives for the benefit of married women," it is provided as follows :

1. It shall be lawful for any married woman, by herself or in her name, or in the name of any third person, with his assent as her trustee, to cause to be insured for her sole use, the life of her husband, for any definite period, or for the term of his natural life; and in case of her surviving her husband, the sum or net amount of the insurance becoming due and payable by the terms of the insurance, shall be payable to her, to and for her own use, free from the claim of the representatives of her husband, or his creditors; but such exemption shall not apply where the amount of the premium annually paid shall exceed three hundred dollars.

2. In case of the death of the wife before the decease of her husband, the amount of the insurance may be made payable to her children, and shall be received by them; or, if under age, by their legal guardian, for their use.

#### OF DIVORCES.

By the act of March 25, 1851, "concerning divorces," it is provided as follows :

1. The several district courts of this state, within their respective districts, shall have exclusive jurisdiction to grant a divorce from bed and board, and from the bonds of matrimony.

2. Divorces may be granted from bed and board, or from the bonds of matrimony.

3. No person shall be allowed to apply for a divorce under the provisions of this act, who has not been a resident of this state for a period of six months immediately preceding such application.

4. (*Amendment of April 1st, 1853.*) Divorces from bed and board, or from the bonds of matrimony, may be granted : 1. For

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<sup>1</sup> Wood's Dig. p. 490.

<sup>2</sup> d. p. 491.



natural impotence existing at the time of marriage. 2. When the female, at the time of the alleged marriage, was under the age of fourteen years, and the alleged marriage was without the consent of her parents or guardian, or other person having the legal custody or charge of her person; and when such marriage was not voluntarily ratified on her part, after she had attained the age of fourteen years. 3. By an act of adultery by either of the parties; but no divorce shall be granted upon the application of the party guilty of the act of adultery complained of, nor if it shall appear to the court that the adultery complained of was by collusion of the parties; nor when it shall appear that the parties have lived and cohabited together as man and wife, after knowledge of the act of adultery complained of. 4. For extreme cruelty in either party, or for habitual intemperance, or for wilful desertion by either party for the period of two years; or for wilful neglect on the part of the husband to provide for his wife the common necessities of life, having the ability to provide the same, for the period of three years. 5. When the consent of either of the parties to the marriage was obtained by force or fraud, upon the application of the injured party. 6. In case of the conviction of either party for a felony after marriage, where the punishment is not less than imprisonment for two years.

5. No action for a divorce, on the ground of natural impotency existing at the time of the marriage, shall be allowed except by the injured party; nor unless instituted within two years after the solemnization of the marriage.

6. When a divorce is granted on the ground of adultery on the part of the wife, the legitimacy of any children born or begotten of her before the act of adultery complained of, shall not be affected by the divorce.

7. In any action for a divorce, the court may, during the pendency of the action, or at the final hearing, or afterward, make such order for the support of the wife, and the maintenance and education of the children of the marriage as may be just, and may at any time thereafter annul, vary or modify such order, as the interest and welfare of the children may require.

8. No divorce shall be granted in any action by default of the defendant, nor on the admission or statement of either party;

but in all cases the court shall require proof of the facts alleged as the grounds for a divorce.

9. By the supplementary act of April 24, 1857, it is provided, that no divorce shall be granted in any action, by default of the defendant, nor on the admission or statement of either party, but in all cases the court shall require proof of the facts alleged as the grounds for a divorce, which proof, if taken before a referee, shall be upon written questions and answers, and free from all legal exceptions as to its competency, admissibility and sufficiency. Nor shall it be lawful for any court to grant a divorce upon any statement or finding of facts by a referee, but only upon the legal testimony taken in the cause. In every action for a divorce, the complaint must be verified.

#### JUDICIAL DECISIONS.

Living together as man and wife is not marriage, nor is an agreement so to live a contract of marriage.<sup>1</sup>

Marriage is a civil contract, and no form is necessary for its solemnization. Where parties are able to contract, an open avowal of the intention, and an assumption of the relative duties which it imposes, are sufficient to render it valid and binding.\*

Under the act defining the rights of husband and wife, property owned by the wife before marriage, and that acquired afterward by gift, bequest, devise or descent, shall be her separate property.\*

The rents and profits of the separate property are declared to be common property.\*

The act governs, if there be no marriage contract containing stipulations contrary thereto.\*

The act confers on the parties, before marriage, an unlimited right to make whatever stipulations they may agree upon, in respect to property, and this is not confined to property *in esse*, but contemplates property to be acquired, and the rents and profits of the present estate.\*

Our statute does not dispense with the interposition of trustees to protect the wife, except with respect to the property specified in the act. In all other respects the common law re-

<sup>1</sup> Letters v. Oady, 10 Cal. 583.

<sup>2</sup> Graham v. Bennet, 2 Cal. 508.

\* Snyder v. Webb, 3 Cal. 82.

mains unaltered, and the wife may resort to trustees for all purposes of security.<sup>1</sup>

Where a wife claims property as her separate estate, it must have been conveyed to her before marriage, or, if afterward, it must have been by gift, devise or descent.<sup>2</sup>

A *feme covert* cannot contract under the laws of this state so as to render her liable in a suit at law.<sup>3</sup>

The act of April 17, 1850, provides that the husband shall have the entire control of the common property, with absolute power to dispose of it, and upon the dissolution of the community by death, one-half the property goes to the survivor. *Held*, that this power in the husband to dispose of the common property does not extend to a disposition by devise.<sup>4</sup>

The statute has done away with the common law right of dower, and substituted in place a half interest in the common property.<sup>5</sup>

The husband and wife are jointly seized of the common property during coverture, with one-half interest remaining over to the wife, subject only to the husband's disposal during their joint lives.<sup>6</sup>

This interest in the wife is a present, definite and certain interest, which becomes absolute at the death of the husband.<sup>7</sup>

The statute gives no greater rights or privileges to wives residing in the state than to those who do not reside here.<sup>8</sup>

The mortgage note of a married woman for a portion of the purchase money of a tract of land cannot be enforced.<sup>9</sup>

All property acquired by either spouse during the existence of the community is presumed to belong to it, and this presumption can only be overcome by proof that it was acquired by the separate funds of one of them. The burden of proof lies upon the party claiming the property as separate. The possession of property by either spouse during the existence of the community, acquired by purchase, creates a presumption that the property is common; and this presumption can only be repelled by clear and decisive proof that it was either owned before marriage, or subsequently acquired in one of the modes designated by statute.<sup>10</sup>

<sup>1</sup> *Snyder v. Webb*, 3 Cal. 88.

<sup>2</sup> 4 Cal. 200.

<sup>3</sup> *Id.* 235.

<sup>4</sup> 5 *Id.* 229.

<sup>5</sup> *Id.* 457.

<sup>6</sup> *Meyer v. Kliner and wife*, January Term, 1850; *Smith v. Smith*.

The sale of separate property of the wife, whether real or personal, must be in writing, signed and acknowledged in the manner pointed out by the statute: otherwise it is void.<sup>1</sup>

The earnings of both husband and wife go into a common fund, and become common property, the control and disposition of which belong to the husband, and when applied by him, or with his assent, for her support, and are sufficient for that purpose, there is no basis for a decree.<sup>2</sup>

A provision made by the husband for the wife is not void as against subsequent creditors, provided the husband is solvent at the time.<sup>3</sup>

Fraud by either party goes to the substance of the marriage contract, and vitiates it, *ab initio*. The concealment by the wife of the fact of her pregnancy by a stranger, at the time of her marriage, is such a fraud as will entitle the husband to a divorce.<sup>4</sup>

Wilful desertion of the other, by either party, for the period of two years, is ground for divorce under the statute, and desertion for a less period is not sufficient to bar a decree.<sup>5</sup>

Though desertion for a less period than two years is not sufficient, under the statute, to bar a decree where the adultery of the defendant is established, yet it furnishes a proper subject for consideration by the court in determining the character of the divorce to be granted. The statute does not intend that a divorce from bed and board, or from the bonds of matrimony, may be granted indifferently, according as the prayer of the applicant asks for one or the other modes of relief. A discretion should be exercised by the courts, according to the special circumstances of each suit, acting upon the settled principles of the common law, as applicable to this class of cases.<sup>6</sup>

The true rule which should govern the courts in the exercise of their discretion in this respect is this, that to entitle to a decree for an absolute divorce from the bonds of matrimony, the applicant must be an innocent party—one who has faithfully discharged the obligations of the marriage relation, and seeks relief because really aggrieved or injured by the misconduct of the other; and, on the other hand, where there are circumstances

<sup>1</sup> 7 Cal. 266.

<sup>2</sup> 9 Id. 475.

<sup>3</sup> Id. 479.

<sup>4</sup> *Baker v. Baker*, April Term, 1889.

<sup>5</sup> 10 Cal. 260.

showing a disregard of those obligations, though not carried to such a degree as to constitute itself a ground for divorce, the decree should be only for a divorce from bed and board. To obtain a release *a vinculo matrimonii*, the applicant must be without reproach, and, however guilty the defendant, if the applicant is chargeable either with similar guilt, or an offence to which the law attaches similar consequences, the relief must be denied; and if the applicant, though not thus guilty, is still not blameless, the relief must be limited to a divorce *a mensa et thoro*.<sup>1</sup>

In an application by a wife for a divorce on the ground of the wilful neglect of her husband, and his failure to provide her with the necessaries of life, for the period of three years, the residence of the husband with the wife within the three years is no answer to the application, where it appears that they were not living together at the commencement of the suit.<sup>2</sup>

Wilful neglect, whether accompanied with desertion, or otherwise, is a distinct ground of divorce.<sup>3</sup>

The neglect must be such as leaves the wife destitute of the common necessaries of life, or such as would leave her destitute but for the charity of others. If those common necessaries are provided by the earnings of either, there is no such wilful neglect as is contemplated by the statute.<sup>4</sup>

#### OREGON.

It is provided by statute (Statutes of Oregon, 1855, p. 536),

1. That marriage, so far as its validity in law is concerned, is a civil contract, to which the consent of the parties capable in law of contracting is essential.

2. Every male person who shall have attained the full age of eighteen years, and every female who shall have attained the full age of fifteen years, shall be capable in law of contracting marriage, if otherwise competent: *provided, however*, that nothing in this act shall be construed so as to make the issue of any marriage illegitimate, if the person shall not be of lawful age.

3. No marriage shall be contracted while either of the parties shall have a husband or wife living; nor between parties who

<sup>1</sup> 10 Cal. 250.

<sup>2</sup> 9 Id. 475.

are nearer of kin than first cousins, computing by the rules of the civil law, whether the half or the whole blood.

4. Marriages may be solemnized by any justice of the peace in the county in which he is elected, and they may be solemnized throughout the state by any judge of a court of record, and by ministers of the gospel, or such other person as may be authorized by any church.

5. If any person intending to marry shall be under the age of twenty-one, if a male, or under the age of eighteen years, if a female, and shall not have had a former wife or husband, the consent in person or in writing of the parent or guardian having the custody of such minor, if he or she have either a parent or guardian living in this territory, shall be given to the person solemnizing the marriage before such marriage shall take place.

6. In the solemnization of marriage, no particular form shall be required, except that the parties shall declare, in the presence of the judge, minister or magistrate, and the attending witnesses, that they take each other as husband and wife; and in every case there shall be at least two witnesses present, besides the person performing the ceremony.

7. Whenever a marriage shall have been solemnized, the person solemnizing the same shall give to each of the parties, if required, a certificate thereof, specifying therein the names and residences of the parties, and of at least two witnesses present, and the time and place of such marriage, and where the consent of the parent or guardian is necessary, stating that the same was duly given.

8. The statute also provides for the filing and recording of certificates of marriages, in a manner substantially similar to that prescribed by the California statute.

9. It is further provided by "An Act relating to Marriages and Divorces," at p. 537 of the Statutes of Oregon, 1855,

That if any person shall undertake to join others in marriage, knowing that he is not lawfully authorized so to do, or knowing to any legal impediment to the proposed marriage, he shall, on conviction, be fined in any sum not exceeding three hundred dollars.

10. No marriage solemnized before any person professing to be a judge, justice or minister, shall be deemed or adjudged to be

void, nor shall the validity thereof be in any way affected, on account of any want of jurisdiction or authority in such supposed judge, justice or minister, provided the marriage be consummated with a full belief on the part of the persons so married, or either of them, that they have been lawfully joined in marriage.

11. Illegitimate children become legitimized by the subsequent marriage of their parents with each other.

12. Marriages contracted with the consent of the parties, when the residence of the parties is remote from any person duly authorized to solemnize such marriage, in any other manner than is herein prescribed, shall be valid : *provided*, that no legal impediment shall exist thereto ; such contracts shall be made in writing, duly attested, and shall be recorded in the office of the recorder of deeds of the proper county, within sixty days after the execution of the same.

13. All marriages solemnized among the people called "Friends" or "Quakers," in the form heretofore practised, and in use in their meetings, shall be good and valid.

#### DIVORCES.

It is provided by chapter II. of the act relating to marriage and divorce (Statutes of Oregon, 1855, p. 538), that,

1. All marriages which are prohibited by law on account of consanguinity between the parties, or an account of either of them having a former husband or wife, then living, shall, if solemnized within this state, be absolutely void, without any decree of divorce, or other legal proceedings.

2. When either of the parties to a marriage, for want of age or understanding, shall be incapable of assenting thereto, or when the consent of either party shall have been obtained by force or fraud, and there shall have been no subsequent voluntary cohabitation of the parties, the marriage shall be void from the time its nullity shall be declared by a court of competent authority.

3. In no case shall a marriage be adjudged a nullity, on the ground that one of the parties was under the age of legal consent, if it shall appear that the parties, after they had attained such age, had, for any time, freely cohabited together as husband and wife ; nor shall the marriage of any insane person be ad-

judged void, after his restoration to reason, if it shall appear that the parties freely cohabited together, as husband and wife, after such insane person was restored to a sound mind.

4. When a marriage is supposed to be void, or the validity thereof is disputed, for any of the causes mentioned in the two preceding sections, either party may file a complaint in the District Court of the county where the parties, or one of them, reside, for annulling the same; and such complaint shall be filed, and proceedings shall be had thereon, as in the case of proceedings in said court for a divorce, and upon due proof of the nullity of the marriage, it shall be adjudged null and void.

5. Divorce from the bonds of matrimony may be obtained by complaint, under oath, to the District Court of the county in which the cause therefor shall have occurred, or in which the defendant shall reside or be found, or in which the plaintiff shall reside, if the latter be either the county in which the parties last cohabited, or in which the plaintiff shall have resided for six months before suit be brought, for the following causes: 1st. Impotency at the time of the marriage, continuing to the time of the divorce; 2d. Adultery since the marriage, remaining unforgiven; 3d. Wilful desertion of either party by the other, for the space of one year; 4th. Conviction of felony, or infamous crime; 5th. Habitual gross drunkenness, contracted since marriage; 6th. Harsh and cruel treatment, or personal indignities, rendering life burdensome; 7th. Voluntary neglect of the husband to provide the wife with a home and the common necessities of life for the space of one year.

#### DOWER.

The common law right of dower is retained, and by the Statutes of Oregon of 1855, page 405, it is provided, that,

1. The widow of every deceased person shall be entitled to dower, or the use during her natural life, of one-third part of all the lands whereof her husband was seized of an estate of inheritance, at any time during the marriage, unless she is lawfully barred thereof.

2. The widow shall be entitled to dower out of lands of the husband, mortgaged before marriage, as against every person except the mortgagee and those claiming under him.



3. A married woman may bar her right of dower, in any estate conveyed by her husband, or by his guardian, if he be a minor, by joining in the deed of conveyance, and acknowledging the same according to law.

4. A woman may also be barred of her dower in all the lands of her husband, by a jointure settled on her, with her assent before the marriage: *provided* such jointure consists of a freehold estate in lands, for the life of the wife at least, to take effect in possession, or profit, immediately on the death of her husband.

5. A woman being an alien, shall not on that account, be barred of her dower; and any woman residing out of the state shall be entitled to dower of the lands of her deceased husband, lying in this state, of which her husband died seized, and the same may be assigned to her, or recovered by her, in like manner as if she and her deceased husband had been residents within the state at the time of his death.

6. It is further provided by the statute relating to marriage and divorce, that when the marriage shall be dissolved by the husband being sentenced to imprisonment, and when a divorce shall be ordered for the cause of adultery, committed by the husband, the wife shall be entitled to her dower in his lands in the same manner as if he were dead; but she shall not be entitled to dower in any other case of divorce.

7. Whenever an order of divorce from the bonds of matrimony is granted in this state, by a court of competent authority, such order shall fully and completely dissolve the marriage contract as to both parties. And in all suits for a divorce, brought by a female, if a divorce be granted, the court may for just and reasonable cause, change the name of such female, who shall thereafter be known and called by such name as the court shall, in its order or decree, appoint.

#### WASHINGTON TERRITORY.

1. By the statutes of the Territory of *Washington*, marriage is declared to be a civil contract. Ministers of the gospel, clergymen and priests, and judges of the Supreme Court, are authorized to perform the marriage ceremony; also judges of the probate court and justices of the peace within their respective counties.

Parties may also be joined in marriage by the Society of Friends according to the rules of their society. But no marriage, legal in other respects, shall be void on account of the incapacity of the person joining parties in marriage; and no marriage shall be void or voidable for the want of any formality required by law, if either of the parties thereto believed it to be a legal marriage at the time.

2. It is further provided that every person who shall join any parties in marriage, shall file a certificate thereof in the office of the clerk of the Probate Court of the county in which such persons were joined in marriage, which certificate shall be recorded by the clerk, and a certified copy thereof shall be evidence of such marriage.

3. A will by an unmarried woman shall be deemed revoked by her subsequent marriage. Section 8 of the act relating to wills, Statutes, page 314.

4. The marriage of an executrix extinguishes her powers, and the letters will thereupon be revoked: Section 29 of the act respecting executors, &c. Statutes, page 272.

#### DIVORCES.

1. Divorces may be granted for the following causes: 1st. When the consent to the marriage of the party applying for the divorce was obtained by force or fraud, and there has been no subsequent voluntary cohabitation; 2d. For adultery on the part of the wife or of the husband when unforgiven, and application is made within one year after it shall come to his or her knowledge; 3d. Impotency; 4th. Abandonment for one year; 5th. Cruel treatment of either party by the other; 6th. Habitual drunkenness of either party, or the neglect or refusal of the husband to make suitable provisions for his family; 7th. The imprisonment of either party in the penitentiary, if complaint is filed during the term of such imprisonment. And divorce may be granted on application of either party for any other cause deemed by the court sufficient, or where the court shall be satisfied that the parties can no longer live together.

2. When there is any doubt as to the facts rendering a marriage void, either party may apply for, and on proof obtain, a decree of nullity of marriage.

3. Any person who has been a resident of the territory for one year, may file his or her complaint for a divorce or decree of nullity of marriage, under oath in the District Court of the county where he or she may reside, and like proceedings shall be had thereon as in civil cases.

4. When the defendant does not answer, or answering, admits the allegations in the complaint, the court shall require proof before granting a divorce or a decree of nullity.

5. In granting a divorce, the court shall also make disposition of the property of the parties as shall appear just and equitable, having regard to the respective merits of the parties and to the condition in which they will be left by such divorce, and to the party through whom the property was acquired, and to the burdens imposed upon it for the benefit of the children, and shall make provision for the guardianship, custody, and support and education of the minor children of such marriage.

6. The order of divorce from the bonds of matrimony, shall, if granted, completely dissolve the marriage as to both parties; and the court may, on granting the divorce, change the name of the female, who shall thereafter be known by the name fixed by the court.

7. It is made the duty of the prosecuting attorney to resist all petitions for divorce which are undefended.

Act regulating divorces. Statutes, p. 405.

#### FORMS.

##### *Certificate of Marriage.*

This certifies, that the rite of holy matrimony was celebrated between Henry Carf, of San Leandro, and Mary Pike, of San Francisco, on the first day of May, 1859, at San Francisco, by

May 2d, 1859. FRANCIS CLARK,  
Minister of Church.

##### *Certificate of Marriage.*

June 5th, 1859.

This certifies, that I, William H. Culver, justice of the peace, in and for the city and county of San Francisco, united in marriage, in the city and county of San Francisco, on the fifth day

of June, one thousand eight hundred and fifty-nine, Ah Ching and Min Tay.

Residence, San Francisco.

Age, twenty-nine.

Color, Asiatic brown.

Place of nativity, Hong Kong.

Single or widowed, widowed.

Residence, San Francisco.

Age, twenty.

Color, fair.

Place of nativity, Canton.

Single or widowed, single.

In accordance with the laws of the state of California.

Witnesses,

HOP LEE,

GOAN HANG,

C. CARVALHO.

WM. H. CULVER,

Justice of the Peace.

### *Deed from Husband to Wife.*

This indenture, made this, &c. [date], between A. B., of [residence], of the first part, and C. B., the wife of said A. B., of the second part, witnesseth: That said party of the first, for and in consideration of the love and affection which he beareth toward his wife, the said C. B., and for the purpose of making her a gift [or, for the purpose of compensating certain advances and benefits of money and property which she brought to said party of the first part by or since their marriage, or for other purpose, as may be], doth hereby give, grant, and convey [or, grant, bargain, and sell], unto his wife, said party of the second part, all that certain property being [here insert description], to have and to hold the same unto the said party of the second part, her heirs and assigns, for her own sole and separate use, benefit, and behoof forever.

And the said party of the first part doth hereby covenant and declare that, by this conveyance, he, for himself, his heirs, executors, administrators, and assigns, doth give, transfer, convey, and relinquish to his wife, the said party of the second part, her heirs and assigns forever, all his right, title, and interest in and to the property above described, with all the rents, issues, and profits thereof, the incidents, tenements, hereditaments, and appurtenances, to have, hold, use, and enjoy, all and singular the same, and every part and parcel thereof, as and for her separate estate, especially relinquishing for himself and his heirs all right or claim to the same or any part thereof, as community property, so that the same may be held by her as separate and not in any respect as community property.

In witness whereof, said party of the first part hath hereto set his hand and seal the day and year first above written.

Sealed and delivered in }  
presence of M. N. }

A. B. [L. s.]

*Record of Marriage.*

(In accordance with the provisions of an Act of the Legislature of the State of California, providing for the Registration of Marriages, Births, Divorces and Deaths in California, approved April 26th, 1882.)

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Date.	Locality.	Names of Parties.	Residence.	Age.	Color.	Place of Nativity.	Single.	Widowed.	By whom Married.	Residence.	Official Station.	Date of Record.	Remarks.
1883. June 30.	Shaw's Flat	Hardwicke Beaumonde. Lucy Wells.	Omoio.	21	White.	Sardinia.	"	"	Geo. Drake, J. P.	Goat Island	Supervisor.	July 2, 1888	Nothing to mention.

*Record of Birth.*

(In accordance with the provisions of an Act of the Legislature of the State of California, providing for the Registration of Marriages, Births, Divorces and Deaths in California, approved April 26th, 1882.)

Date.	Locality.	Name.	Sex.	Color.	Names of Parents.	Nativity.	Color.	Residence.	Date of Record.	Remarks.
1889. April 1.	San Francisco.	Hardwicke Beaumonde. Punch Beaumonde. Tiania Beaumonde.	Male. Male. Female.	White. White. White.	Hardwicke Beaumonde. Lucy Beaumonde.	Sardinia Cape Cod	White. "	Goat Island.	April 1, 1889.	All flourishing.

*Record of Death.*

(In accordance with the provisions of an Act of the Legislature of the State of California, providing for the Registration of Marriages, Births, Divorces and Deaths in California, approved April 26th, 1882.)

Date.	Name.	Sex.	Age.	Color.	Single.	Married.	Occupation.	Nativity.	Cause of Death.	Place of Interment.	Date of Record.	Remarks.
1889. July 10.	Hardwicke Beaumonde, Jr.	Male	3 mo.	White.			None.	Goat Island.	Brain fever.	Lone Mountain Cemetery.	Aug. 10, '89	Precocious.

*Record of Divorce.*

(In accordance with the provisions of an Act of the Legislature of the State of California, providing for the Registration of Marriages, Births, Divorces and Deaths in California, approved April 26th, 1882.)

Date.	Names.	Residence.	Name of Applicant.	Ground of Divorce.	Court.	Date of Record.	Remarks.
1889. Aug. 1.	A. R. M. R.	San Francisco.	M. R.	Extreme Cruelty.	Twelfth District Court.	Aug. 30, 1889.	Aggravated case.

*Certificate of Marriage in Oregon.*—[To be recorded within three months after such marriage.]

State of Oregon, } ss:  
County of \_\_\_\_\_,

This is to certify that the undersigned, a justice of the peace, of said county [minister of the gospel, or judge, &c., as the case may be], did on the \_\_\_\_\_ day of \_\_\_\_\_ A. D. 18\_\_\_\_, join in lawful wedlock, A. B. and C. D., with their mutual consent, in presence of E. F. and G. H., witnesses.

J. P., Justice of the Peace.

*Form of Marriage Service.*

John Doe, will you have this woman to be your wedded wife, to live together in the holy estate of matrimony; will you love her, comfort her, honor and keep her in sickness and in health, and forsaking all others keep thee only unto her, so long as you both do live? [Answer.]

Mary Jones, will you have this man to be your wedded husband, to live together in the holy estate of matrimony; will you obey him, love, honor and keep him in sickness and in health, and forsaking all others, keep thee only unto him so long as you both do live? [Answer.]

Then, by virtue of the authority in me vested by the laws of the state of California, I now pronounce you man and wife.

WM. H. CULVER,  
Justice of the Peace.

*Conveyance from Husband to an Intervening Party for Conveyance to Wife.*

This indenture, made and entered into this 20th day of June, eighteen hundred and fifty-nine, between John Matthias, of the county of Alameda of the first part, and James Alexander of the second part, witnesseth: whereas the said party of the first part is the owner in fee of the tract of land and premises hereinafter described, and intends, in consideration of the love and affection which he bears his wife, Anna Matthias, to make her a gift of said tract of land, and of the rents, issues and profits thereof, as her separate property; and has requested the said party of the second part to accept a conveyance thereof, and thereupon to convey the same to the separate use of his said wife;

Now the said party of the first part, in order to give effect to such intention, in consideration of the premises, of the promise by said party of the second part to convey the said lands and premises in the manner and for the purpose aforesaid, and of the sum of one dollar, lawful money of the United States, to him in

hand paid, by the said party of the second part, at or before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, hath granted, bargained, sold, aliened, remised, released, and conveyed, and by these presents doth grant, bargain, sell, alien, remise, release, convey, and confirm unto the said party of the second part and to his heirs and assigns forever, all that certain lot, piece, or parcel of land, situate, lying, and being in the county of Alameda, bounded and described as follows, to wit: [*here insert description,*] together with all and singular, the tenements, hereditaments, and appurtenances thereunto belonging or in anywise appertaining; and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof, and also all the estate, right, title, interest, property possession, claim, and demand whatsoever, as well in law as in equity, of the said party of the first part, of, in, and to the said above described premises, and every part and parcel thereof, with the appurtenances; to have and to hold all and singular the above-mentioned and described premises, with the said party of the second part, his heirs and assigns forever.

In witness whereof the said party of the first part hath hereunto set his hand and seal the day and year first above written.

JOHN MATTHIAS. [L. S.]

Sealed and delivered in presence }  
of GEORGE BROWN.

*Conveyance from Intervening Party to Wife.*

This indenture, made this 21st day of June, A. D. one thousand eight hundred and fifty-nine, between James Alexander, of the county of Alameda, counsellor at law, of the first part, and Anna Matthias, of the second part, witnesseth: Whereas one John Matthias, of the county of Alameda, being the owner in fee of the premises hereinafter described, intends, in consideration of the love and affection which he bears to his wife Anna Matthias, to make her a gift of the same, and of the rents, issues and profits thereof, as her own separate property, and to effect such intention, has, by conveyance bearing date the 20th day of June, A. D. 1859, conveyed the said premises to the party hereto of the first part, with a request on his part, and a promise on the part of the party of the first part, that he would convey the same by good and sufficient conveyance to the party hereto of the second part. Now, the said party of the first part, in pursuance of the said request, and in consideration of the promises and of said promise, hath granted, bargained, sold, aliened, released, conveyed and confirmed, and by these presents doth grant, bargain, sell, alien, remise, release, convey and confirm unto the said party of the second part, and to her heirs and as-

signs forever: [*here insert description.*] Together with, &c. [*as in the foregoing*], to have and to hold, all and singular the above mentioned and described premises, together with the appurtenances, unto the said party of the second part, her heirs and assigns, to the sole and separate use, benefit and behoof of the said party of the second part, her heirs and assigns forever, independently of her present or any future husband, and not liable or subject to his debts, control or interference.

And it is expressly intended in, and provided by this conveyance, that the rents and profits of the said property shall be applied to the sole and separate use of the said party of the second part; that the same shall be subject to her entire management and disposal, shall be payable to her on her separate receipt, and shall not be liable to the debts, control or interference of her said husband.

In witness whereof the said party of the first part hath hereto set his hand and seal, the day and year first above written.

JAMES ALEXANDER. [L. S.]

Sealed and delivered in presence }  
of GEORGE BROWN. }

#### *Inventory of Separate Property of Wife.*

Inventory of the separate property of Anna Matthias, wife of John Matthias, of the County of Alameda, State of California:

Know all men by these presents: Whereas, James Alexander, of the county of Alameda, did, in and by his certain indenture, bearing date the 21st day of June, A. D. 1859, grant, bargain, sell, alien, remise, release, convey and confirm unto me, Anna Matthias, wife of John Matthias, of the county of Alameda, certain real estate in the county of Alameda, in said indenture, and hereinafter particularly described, for the consideration in said indenture mentioned, the said property being conveyed to me by way of gift from my said husband, no valuable consideration passing therefor from me or my said husband, to the said James Alexander; which said real estate is particularly described as follows: [*here insert description.*] Together with the rents, issues and profits of said premises, which are therein expressly reserved and conveyed to my sole and separate use.

And whereas, by gift or other right, I own and am possessed of certain other property, real estate, described as follows: [*here insert description,*] and also certain personal property, to wit: [*here describe the articles of personal property.*]

Now therefore, I, the said Anna Matthias, wife of the said John Matthias, by and with the consent of my said husband, signified by his signing and executing these presents, do hereby publish, make known, and declare, that the above mentioned and



described real and personal estate is my separate property, and that the foregoing is a full and complete inventory of such separate property.

In witness whereof, I and my said husband have hereunto set our respective hands and seals this 21st day of June, A. D. eight een hundred and fifty-nine.

SARAH MATTHIAS. [L. S.]

In presence of }  
GEO. BROWN. }

JOHN MATTHIAS. [L. S.]

*Conveyance of Husband's Property to a Trustee for Benefit of the Wife.*

This indenture made the                      day of                      , in the year one thousand eight hundred and fifty-nine, between A. B., of, &c., of the first part, and C. D., of, &c., of the second part, that whereas the said party of the first part, being in solvent circumstances, and desirous of making provision for his wife, M. B., against future contingencies, and for her maintenance and support, now this indenture witnesseth that in consideration of the premises, and of one dollar, lawful money of the United States, to him in hand paid by the said party of the second part, at or before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, hath granted, bargained, sold, aliened, remised, released, conveyed and confirmed, and by these presents doth grant, bargain, sell, alien, remise, release, convey and confirm, unto the said party of the second part, and to his heirs and assigns, forever, all [*description* ;] together with all and singular the tenements, hereditaments and appurtenances, thereunto belonging, or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof: and also, all the estate, right, title, interest, property, possession, claim and demand, whatsoever, as well in law as in equity, of the said party of the first part, of, in, or to, the above-described premises, and every part and parcel thereof, with the appurtenances, to have and to hold, all and singular the above mentioned and described premises, together with the appurtenances, unto the said party of the second part, his heirs and assigns, upon the trusts, nevertheless and to and for the uses, interests and purposes, hereinafter limited, described and declared, that is to say.

*First.* In trust to lease the same, and to take, collect and receive the rents, issues and profits thereof, and out of the same to keep the said premises in good order and repair, and properly insured; and pay all taxes, assessments and charges thereon.

*Secondly.* In trust to pay the residue of such rents, issues and income to his said wife, M. B., upon her sole and separate receipt, to the intent and purpose that she may enjoy, possess, and

have the same free from the interference or control of any person whatsoever during the term of her natural life.

*Thirdly.* In trust to convey the said land and premises to such person as she, the said M. B., by her last will and testament, or instrument in the nature of a last will and testament, subscribed by her, in the presence of two competent witnesses, may direct and appoint.

And it is hereby further declared and agreed by and between the parties hereto, that upon the decease of the said M. B., the said above-recited trust shall cease and determine, and the said land and premises hereinbefore described, shall belong in fee simple, absolute, to such person or persons as the said M. B. shall so as aforesaid direct and appoint, and in default of such appointment the said land and premises shall revert to the said party of the first part, and to his heirs, to his and their sole use and behoof forever.

Provided always, nevertheless, and it is hereby expressly declared and understood by and between the parties thereto, that it shall and may be lawful, to and for the said party of the second part, his heirs and assigns, from time to time, to retain and reimburse to himself and themselves, out of the property hereby granted and assigned, all such costs, charges, and expenses as he or they may be put to in the performance or execution of the said trust or any thing relating thereto.

And provided also that, in case the trustee herein appointed, or any succeeding trustee or trustees of the said trust estate, to be appointed as hereinafter mentioned, die, or shall neglect, decline, or be incapable to act in said trust, before the same shall be fully performed and executed, then, and as often as the same may happen, it shall and may be lawful for the said M. B., by any instrument of writing under hand and seal, to nominate, substitute, and appoint some other fit person or persons to be trustee or trustees of and in the said premises, in place and stead of the trustee or trustees so dying, neglecting, declining, or becoming incapable to act as aforesaid; and, upon such nomination and appointment, the person or persons so to be appointed, shall be and stand seized of the said premises, with the appurtenances in trust for the same uses, intents, and purposes, and subject to the provisos and conditions hereinbefore mentioned and declared of and concerning the same. And the said A. B., for himself and his heirs, the above-described and hereby granted and released premises, and every part and parcel thereof, with the appurtenances, unto the said party of the second part, his heirs and assigns, against the said party of the first part and his heirs, and against all and every person and persons whomsoever, lawfully claiming, or to claim the same, shall and will warrant, and by these presents forever defend.

In witness, &c.

*Appointment of a New Trustee in place of one Deceased. n*

Whereas, by a certain indenture, made, &c., between A. B., of, &c., of the first part, and C. D., of, &c., of the second part, certain real estate therein described was conveyed to the said C. D., upon certain trusts therein mentioned and declared; and whereas the said C. D., the trustee therein named, is since deceased, and the said trusts remain unperformed and unexecuted; now, therefore, I, M. B. of, &c., the wife of the said A. B., in pursuance and performance of the power and authority therein given and reserved to me for that purpose, have nominated and appointed, and by these presents do nominate and appoint L. N., of, &c., to be a new trustee in place of the said C. D. deceased, for the trusts, and to and for the ends, intents, and purposes therein mentioned, expressed, or declared, of and concerning the same, and to and for no other use, intent, or purpose whatsoever.

In witness, &c.

*Articles of Separation.*

This indenture, made, &c., between A. B., of the first part; C. D., the wife of the said A. B., but now living separate and apart from him, of the second part; and E. F., trustee, of the third part: Whereas unhappy differences have arisen, and do still subsist between the said A. B. and C. D., and by reason of the same they have agreed to live separate and apart from each other during their natural lives. Now, therefore, the said party of the first part, in consideration of the premises, and in pursuance thereof, doth hereby covenant, promise and agree to and with the said E. F., and also, to and with his said wife, that, notwithstanding the marriage existing between them, it shall and may be lawful to and for the said C. D., at all times hereafter, to live separate and apart from him, the said A. B.; and the said A. B. shall not, nor will, compel her to cohabit or live with him; and that the said C. D. shall be, to all intents and purposes whatsoever, freed and discharged from the power, will, command and authority of the said A. B.; and that he shall not, nor will at any time hereafter, under any pretence whatsoever, sue, prosecute, or disturb any person or persons for receiving, harboring, protecting or assisting the said C. D., or offer any violence, force or restraint to her person, or molest, interrupt or disturb her in her manner of living, or in her liberty or freedom of going to, or staying in, or returning from, such place or places as she shall think proper; that he will not claim nor demand any of her money, jewels, plate, clothing, household goods or furniture which the said C. D. now has in her power or possession, or which she shall or may hereafter acquire by gift, bequest, devise or descent, or that may be otherwise acquired.

And the said A. B. doth hereby further covenant, promise and agree, that he will well and truly pay, or cause to be paid, unto the said E. F., for and toward the support and maintenance of C. D., his wife, the clear yearly sum of \_\_\_\_\_ dollars, payable monthly, on the first day of each and every month hereafter, during the joint lives of himself and the said C. D.

And the said E. F., in consideration of the sum of one dollar, to him duly paid by the said A. B., doth covenant and agree to and with the said A. B., that he shall and will, from time to time, and at all times hereafter, well and truly save, defend, keep harmless and indemnify the said A. B., his heirs, executors and administrators, and his and their estates and effects, of, from, and against all and every debt and liability which the said C. D. hath already contracted or incurred, or shall at any time or times hereafter contract or incur, and of and from all actions, suits, claims and demands, costs, charges, damages and expenses for, upon account, or in respect of such debts and liabilities, or any of them, or any act, deed or thing in anywise relating to the premises. [*Provided, always, that in case the said A. B. and C. D. shall at any time hereafter, with their mutual consent, cohabit as man and wife, then, and in such case, the yearly sum of \_\_\_\_\_ dollars, hereinbefore covenanted to be paid, shall cease and be no longer payable, and from thenceforth all the covenants hereinbefore contained on the part of the said E. F. shall become null and void, any thing hereinbefore contained to the contrary thereof, notwithstanding.*]

In witness whereof, the said parties have hereunto set their hands and seals, the day and year first above written.

Signed, sealed and delivered {	A. B. [L. s.]
in presence of {	C. D. [L. s.]
	E. F. [L. s.]

#### *Settlement of a Wife's Estate in Contemplation of Marriage.*

This indenture of three parts, made, &c., between A. B., of, &c., of the first part, C. D., of, &c., of the second part, and E. F., of, &c., of the third part, witnesseth: Whereas the said C. D. is seized in fee simple of all that certain lot of land, situate, lying and being in \_\_\_\_\_ and whereas a marriage is intended shortly to be had and solemnized between the said A. B. and the said C. D., now, therefore, in consideration of the premises, and of one dollar in hand paid to the said C. D. by the said E. F., the said C. D. hath granted, bargained and sold, and by these presents doth grant, bargain and sell, unto the said E. F., all the following described premises [*here insert description*], to have and to hold the said premises, unto the said E. F.,

and his heirs and assigns, upon the special trusts, and for the uses and purposes following, to wit:

1st. To lease the same, and to take, collect and receive the rents, issues and profits thereof, and out of the same to keep the said premises in good repair and properly insured, and pay all taxes and assessments and charges thereon.

2d. To pay the residue of said rents, issues and profits thereof, to the said C. D., upon her sole and separate receipt, to the intent that she may enjoy, possess and have the same, free from the control or interference of the said A. B., her husband.

3d. That in case of the decease of the said C. D., after the solemnization of the said marriage, and during the life of her said husband, the said E. F. shall convey the said land and premises to such person as she, the said C. D., by her last will and testament, or instrument in the nature of a last will and testament, subscribed by her, in the presence of two witnesses, may direct and appoint. And in default of such appointment, then and in that case the said land and premises shall be conveyed to such person or persons as would be the legal heir and representative of the said E. F., by the statute for the distribution of intestate estates.

4th. That in case of the decease of the party of the third part, or of his resignation of said trust, he, or his executors or administrators, shall convey the whole of the trust estate to such person, or persons, as may be appointed in writing by the party of the second part, to be the trustee, or trustees, under this indenture; and such new trustee, or trustees, shall have all the powers, and shall hold the trust estate subject to all the provisions, herein set forth and expressed.

And the said party of the first part doth hereby signify his assent to the provisions of this indenture, and doth covenant to and with the said party of the third part, and his successors in the said trust, to permit the said party of the second part, after the solemnization of the said intended marriage, to receive the aforesaid profits to her sole and separate use, and freely to dispose of the trust estate, by her will, or by her testamentary appointment, and not to interfere with the said trust estate, rents, issues, &c.

In witness [*as in other forms.*]

#### *Deed of Trust for Benefit of Wife.*

This indenture, made, &c., witnesseth, &c. [*as in other forms*], all that certain lot, piece, or parcel of land, situate, lying, and being in said city of San Francisco, bounded and described as follows, to wit: [*here insert description*] and also all and singular the house-

hold furniture, goods and chattels now in the dwelling-house on said premises, together with all and singular the buildings, tenements, hereditaments, and appurtenances thereunto belonging, or in any-wise appertaining, and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof; and all the right, title, interest, estate, property, possession, claim, and demand whatsoever, both at law and in equity, of the said parties of the first part, in and to the above-described premises, and every part and parcel thereof, with the appurtenances; to have and to hold all and singular the above-mentioned and described premises, household furniture, &c., together with the appurtenances unto the said party of the second part, his heirs and successors forever: in trust, nevertheless, for the sole and separate use, benefit, and behoof of said \_\_\_\_\_, wife of said \_\_\_\_\_, her heirs and assigns forever, free from the control and disposition, and from the debts and liabilities of her said husband, and to collect and receive the rents, issues, and profits thereof, and pay over the same, when and as received, to said \_\_\_\_\_, to and for and to be applied to her sole and separate use, free from the control and disposition, debts and liabilities of her said or any future husband.

In witness whereof, the said parties of the first part have hereunto set their hands and seals, the day and year first above written.

Sealed and delivered in }  
presence of }

[L. S.]  
[L. S.]

*Declaration by a Married Woman as Sole Trader.*

State of California, }  
City and County of San Francisco, } ss:

Know all men by these presents: That I, Mary Barlow, of said city and county, wife of John Barlow, residing in the city and county of San Francisco and state aforesaid, do hereby declare and make known my intention to carry on business on my own account, and in my own name as sole trader, in pursuance of an act of the legislature of the state of California, entitled, "An Act to authorize Married Women to transact Business in their own Name as sole Traders;" approved April 12, 1852. And I further declare, that said business will be the business of a boarding-house, and will be carried on and practised in said city and county of San Francisco, and that the amount of capital invested in this business does not exceed five thousand dollars; [does not exceed eight thousand dollars—and the said Mary Barlow further declares, that the excess of money above five thousand dollars, did not come from any fund or funds belonging to her said husband.]

In witness whereof, I have hereunto set my hand and seal, this  
first day of July, A. D. 1859. MARY BARLOW. [L. s.]

In presence of }  
THOMAS WILLIAMS. }

State of California, }  
City and County of San Francisco, } ss:

On this first day of July, A. D. 1859, before me, Thomas Williams, a notary public in and for the county aforesaid, personally appeared Mary Barlow, wife of John Barlow, personally known to me to be the individual described in, and who executed the above declaration as a party thereto, and that said Mary Barlow, wife of the said John Barlow, having been by me first acquainted with the contents of said instrument, acknowledged to me on an examination apart from and without the hearing of her said husband, that she executed the same freely and voluntarily, without fear or compulsion, or undue influence of her said husband, and that she does not wish to retract the execution of the same.

In witness whereof, I have hereunto set my hand and affixed my official seal, in the county aforesaid, the day and year last above written.

THOMAS WILLIAMS,  
Notary Public. [L. s.]

## CHAPTER XXII.

## THE INSANE, INDIGENT, SICK, POOR AND VAGRANTS.

## INSANE PERSONS.

THE Insane Asylum of the state of California is under the management of a board of trustees, consisting of five members, chosen by the legislature. The resident physician is elected in like manner, and holds his office for two years, at a yearly salary of five thousand dollars. He is also the superintendent and chief executive officer of the Asylum. He appoints, with the approval of the trustees, the necessary and proper number of assistants and attendants.

An assistant physician is also appointed, who performs such duties as may be directed by the superintendent, and prescribed by the by-laws.<sup>1</sup>

The provision of the statute regulating the admission of patients to the Asylum, as amended by the act of 1859, is as follows:

The county judge of any county in this state shall, upon application of any person under oath, setting forth that any person by reason of insanity is unsafe to be at large, or is suffering under mental derangement, cause the same person to be brought before him at such time and place as he may direct; and the said county judge shall also cause to appear at the same time and place two respectable physicians, who shall proceed to examine the person alleged to be insane, and if said physicians, after careful examination, shall certify upon oath that the charge be correct, also to the name of the patient, age, birth-place, length of residence, state last from, previous habits, apparent cause of insanity, length of time affected, class of insanity, and present condition of the person affected, as near as may be ascertained, of every lunatic person so examined, and if such judge be satisfied that

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<sup>1</sup> Wood's Dig. art. 87-99.



such person is by reason of insanity unsafe to be at large, he shall direct the sheriff of the county to convey to and place in the Insane Asylum such lunatic person, and shall transmit a copy of the physicians' certificate to the resident physician of said asylum. The county judge shall also cause inquiry to be made into the ability or inability of such insane person to bear the charge or expense for the time he may remain in the asylum, and he shall certify the result of the inquiry to the trustees of the asylum, and in those cases where the insane person possesses the ability to pay this expense, the trustees shall require a deposit at the time of admission, and from time to time, in advance, so long as the insane person remains an inmate of the asylum.

An indigent insane person is sent to the asylum at the expense of the county from whence he is certified; and, in the event of his death, his funeral expenses are furnished from the same source. He is treated there without charge, and is entitled to the same medical care and treatment as paying patients, and to good and wholesome diet.<sup>1</sup>

Whenever any convict confined in the state prison shall, in the opinion of the physician of the prison, be insane, and should be removed to the Insane Asylum, the physician shall make oath to the same before the county judge in the county in which the said prison is located, and said judge shall summon two competent physicians to examine the alleged case of insanity, and if in their opinion the said convict is of unsound mind and should be removed, the judge shall send the statement of said physicians, with his opinion, to the governor, who is hereby authorized, in his discretion, to remove said convict to the State Insane asylum.<sup>2</sup>

Should said convict recover his sanity before the expiration of his term of sentence, the resident and assistant physician of the Asylum shall certify the same to the governor, who, upon the receipt of such certificate, shall order said convict to be sent back to the state prison.<sup>3</sup>

An act committed by a person in a state of insanity cannot be published as a public offence, nor can a person be tried, adjudged

<sup>1</sup> Wood's Dig. art. 102 and 108.

<sup>2</sup> Id. 103.

to punishment or punished for a public offence, while he is insane.<sup>1</sup>

If the question of insanity arise upon the trial, or upon pronouncing judgment, a jury is summoned to try, and pass upon the same; and if the defendant be found to be insane, his trial or judgment is suspended until he become sane—and, if necessary, the court may order him into the keeping of the sheriff or some proper person.<sup>2</sup>

When an insane person has property, the Probate Judge is authorized, after the insane person has been notified, and has been produced for examination, to appoint a guardian to take charge of such insane person and of his property, and to have the control and management of the same, with like authority as a guardian for a minor.<sup>3</sup>

A guardian may be appointed in like manner and with like authority for any person, who, by reason of extreme old age, or other cause, is mentally incompetent to manage his property.<sup>4</sup>

#### INDIGENT SICK.

For the care, aid and medical treatment of the indigent sick of a county, it is provided that the board of supervisors shall use the portion of the hospital fund provided by the state, apportioned to such county, and levy a county tax annually.<sup>5</sup>

With the means thus provided, the supervisors are required to provide the buildings, and procure the medical aid and attendance that may be necessary.<sup>6</sup>

Applications by indigent sick persons for medical aid and for admission to the hospital, are made to the supervisors, or the physician by them appointed.<sup>7</sup>

#### THE POOR.

Benevolent associations may be formed and incorporated for the care and protection of sick and disabled, or unprotected and needy persons, orphans, foundlings, &c. See chapter on CORPORATIONS.

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<sup>1</sup> Wood's Dig. art. 1773.

<sup>2</sup> Id. 1774-1780.

<sup>3</sup> Id. 2872.

<sup>4</sup> Id. 3275-3281.

## VAGRANTS.

All persons, except Digger Indians, who have no visible means of living, who, in ten days do not seek employment, nor labor when employment is offered to them; all healthy beggars who travel with written statements of their misfortunes; all persons who roam about from place to place without any lawful business; all lewd and dissolute persons who live in and about houses of ill-fame; all common prostitutes and common drunkards, may be committed to jail, and sentenced to hard labor for such time as the court before whom they are convicted shall think proper, not exceeding ninety days.<sup>1</sup>

## OREGON AND WASHINGTON.

The statutes of both *Oregon* and *Washington* in relation to the poor and indigent sick, provide that the county commissioners are invested with the superintendence of the poor of their county. They are authorized to build a workhouse, and to take care of such paupers and sick people of the county as are without relatives. Where any person likely to become a county charge has relatives, they are compelled to provide for such pauper; children being first called upon, next parents, and next the brothers and sisters, when they have sufficient ability.<sup>2</sup>

## OREGON.

The same statute exists in Oregon, relative to the appointment of a guardian for an insane person as in California, and the proceedings are had in like manner, and the guardian appointed has like authority. The words "insane person," are made to include "every idiot, every person not of sound mind, every lunatic and distracted person."<sup>3</sup>

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<sup>1</sup> Wood's Dig. art. 8450.

<sup>2</sup> Statutes O. p. 898 and 899.

<sup>3</sup> Statutes O. p. 505, 506; Statutes W. p. 895, 896.

## FORMS.

*Petition for Appointment of Guardian for an Insane Person.*

To the Hon. Thomas W. Freelon, County Judge and Judge of the Probate Court of the County of San Francisco.

The petition of Mary Ann Denny, of the city of San Francisco, respectfully sheweth,

That she is the sister of Mary Champlain, whose maiden name was Sarah Twist, and who is at present at the residence of Mrs. Eagle, near Pacific street, in the said city of San Francisco.

That the said Sarah Champlain is the owner and possessed or entitled to the possession of certain property; that she is insane and mentally incompetent to manage her property.

Wherefore, your petitioner prays that such proceedings may be had and taken in the premises, as may be necessary for the appointment of a guardian of the person and estate of the said Sarah Champlain, and that such guardian be appointed.

Sworn to, &c.

MARY ANN DENNY.

*Order that Insane Persons be Notified and be Produced before Probate Judge.*

In the matter of the Insanity of }  
Sarah Champlain.

On reading the foregoing petition, it is ordered, that the above matter come up for a hearing before me at the county court room [or, at my chambers] in the city-hall of the city of San Francisco, on the 27th day of October, A. D. 1856, at 11 o'clock, A. M., of that day, and that notice be given to the said Sarah Champlain of the time and place of hearing the case, not less than five days before the time so appointed.

And that the said Sarah Champlain, if able to attend, be produced before me on the hearing.

T. W. FREELON, County Judge.

San Francisco, October 22d, 1856.

*Order Appointing Guardian of an Insane Person.*

Probate Court of said county.

In the matter of the Guardianship of }  
Morris Saxe, charged with Insanity. }  
State of California, } ss:  
City and County of San Francisco, }

Having heretofore, upon the petition of Charles Bain, representing that the above named Morris Saxe, is insane and mentally

incompetent to manage his property, and praying for the appointment of a guardian of the person and estate of the said Morris Saxe, caused a notice to be given to the said Morris Saxe of the time and place of hearing the case, not less than five days before the time so appointed; and on reading and filing proof of due personal service of said notice upon said Morris Saxe. After a full hearing and examination upon such petition, it appearing to the probate judge that the said Morris Saxe, is insane and incapable of taking care of himself and managing his property, it is ordered, that James R. Jones of said city and county, who is hereby required to execute to the said Morris Saxe, a bond, according to the statute in such case made and provided, with sufficient sureties, to be approved by said probate judge, in the sum of sixteen hundred dollars, be, and he is hereby appointed guardian of the person and estate of Morris Saxe, above named, upon giving such bond.

T. W. FREELON, County Judge.

Dated, San Francisco, January 5th, A. D., 1857.

*Guardian's Bond.*

Know all men by these presents, that we, A. B., C. D. and E. F., are held and firmly bound unto K. A., an insane person, in the sum of five hundred dollars, lawful money of the United States of America, to be paid to the said K. A., for which payment well and truly to be made, we bind ourselves, our executors, administrators and assigns, jointly and severally, and firmly by these presents.

Sealed with our seals, and dated this twenty-second day of March, 1858.

The condition of the above obligation is such, that, whereas application has been made to the judge of the Probate Court of the city and county of San Francisco, state of California, for the appointment of A. B. guardian of the person and estate of the said K. A.,

Now, therefore, if the said A. B. be appointed such guardian, and shall faithfully perform the duties of his trust according to law, and shall:

1st. Make a true inventory of all the estate, real and personal, of his said ward that shall come to his possession or knowledge; and shall return the same within such time as the said judge shall order.

2d. Shall dispose of and manage all such estate according to law, and for the best interest of said ward, and faithfully discharge his trust in relation thereto; and also in relation to the care, custody and education of said ward.

3d. Shall render an account on oath of the property, estate

and moneys of said ward in his hands; and all proceeds or interest derived therefrom, and of the management and disposition of the same within one year after his appointment, and at such other times as the court shall direct; and

4th. At the expiration of his trust shall settle his accounts with the probate judge, or with the said ward, if he be of full age, or his legal representatives; and shall pay over and deliver all the estate, moneys and effects remaining in his hands, or due from him on such settlement, to the person or persons who shall be lawfully entitled thereto.

Then this obligation shall be void and of no effect, else to remain of full force and virtue.

Sealed and delivered in the presence }	A. B. [L. s.]
of D. P. }	C. D. [L. s.]
	E. F. [L. s.]

State of California, }  
City and County of San Francisco, } ss:

C. D. and E. F., being duly sworn, each for himself says, that he is a freeholder resident in said state, and is worth the said sum of five hundred dollars over and above all his just debts and liabilities, exclusive of property exempt from execution. C. D.  
E. F.

Sworn to before me this 22d day of March, 1858,  
D. P. BELKNAP, Deputy Clerk of the Probate Court.

*Application to send a Lunatic to the Asylum.*

State of California, }  
City and County of San Francisco, }

To Hon. M. C. Blake, County Judge of said City and County:

J. W. McKenzie respectfully represents, that there is now in said city and county, a person named Pierre Larme, who is insane, and suffering under mental derangement, and is, by reason of insanity, unsafe to be at large, and is a proper subject for the insane asylum.

And the said J. W. McKenzie being duly sworn, deposes and says the foregoing statement is true: wherefore he prays that such action may be had as is by law required, and that the said Pierre Larme may be sent to the insane asylum at Stockton.

Subscribed and sworn to this 10th } J. W. McKENZIE.  
day of May, A. D. 1859, before me, }  
M. C. BLAKE, County Judge.

We, F. A. Holman and S. R. Gerry, being duly sworn, do depose and say, that we are physicians, residing in said city and county: that, at the request, and in the presence of M. C. Blake, county judge of said city and county, we have carefully ex-

amined Pierre Larme, named in the foregoing application, and do find, and so certify, that said Pierre Larme is insane, suffering under mental derangement, and by reason of insanity unsafe to be at large, and is a proper subject for the insane asylum, as set forth in said application. That, as near as can be ascertained, said Larme is twenty-six years old, was born in Lyons, France, has been in this state one month, came here from the state of New York, his previous habits good, cause of insanity epilepsy, has been affected from early life, class of insanity *dementia* from epilepsy, and his present condition is quiet, physical health good.

Subscribed and sworn to before me, } S. R. GERRY, M. D.  
 this 10th day of May, A. D. 1859. } F. A. HOLMAN, M. D.  
 M. C. BLAKE, County Judge.

*Certificate on the above Application.*

The foregoing application having been duly made to me, M. C. Blake, county judge of the city and county of San Francisco, and Pierre Larme, named in said application, having this day been brought before me, and in my presence carefully examined by Doctors Holman and Gerry, two respectable physicians, and they having thereupon made the foregoing certificate, by them duly subscribed and sworn to, and being myself fully satisfied of the truth of all the matters set forth in said application and certificate, I do hereby order the said Pierre Larme, to be conveyed to and placed in the insane asylum at Stockton; and the sheriff of said city and county is charged with the execution of this order.

Upon inquiry duly made, as by law required, I find, as the result thereof, that the said Pierre Larme has no means of paying the charges and expenses for the time he may remain at the asylum.

Witness my hand and the seal of our county court, this  
 [L. s.] 10th day of May, A. D. 1859.

M. C. BLAKE, County Judge.

Attest, WILLIAM DUEB, County Clerk.

By J. F. BOWMAN, Deputy County Clerk.

## CHAPTER XXIII

## INSOLVENCY.

ASSIGNMENTS of the property of insolvent debtors can only be made, in California, in accordance with the statute for "the relief of insolvent debtors, and the protection of creditors;" the old practice of voluntary assignments for the benefit of creditors, at common law, being rendered void.

By that statute, an insolvent debtor is authorized to petition the district or county court, to make a surrender and cession of all his estate for the payment of his debts; and after due notice is given, by publication under the order of the court, a meeting of the creditors is convened, when assignees are appointed who take the assets of the debtor; and if within ten days thereafter no opposition be made by any creditor, or if made, after due trial of the questions raised by such opposition, the same be decided in favor of the debtor, and if the proceedings have been conducted according to the requirements of the statute, and are free from fraud, the debtor is discharged from all further liability on account of all the debts and liabilities he has set forth in his schedule. The assignees then proceed to realize the assets, and distribute, *pro rata*, among the creditors.

The above outline expresses merely the theory of the statute of 1852, which may be referred to at length in *Wood's Digest*, page 496.

The following amendment is found in the laws of 1858, page 58:

SECTION 1. Section thirtieth of said act is hereby amended to read as follows: All insolvent debtors owing, or accountable in any manner for public funds, or property of whatever nature or kind; all unfaithful depositaries; all such as refuse or neglect to pay up all funds received by them as bankers, brokers, commission merchants, or for money, goods, or effects received by them in a fiduciary capacity, shall be denied the benefit of this act;



*provided*, that such parties may avail themselves of this act for the purpose of procuring an equal distribution of their assets among their creditors, and for that purpose only said act shall apply to estates of such insolvents in this section mentioned; *and provided, further*, such debtor may be discharged from all debts not named in this section.

## JUDICIAL DECISIONS.

Cases of insolvency, under the act of 1852, are special cases within the meaning of the constitution.<sup>1</sup>

The legislature, in conferring jurisdiction in these cases on both the district and the county courts, acted in the exercise of a legitimate power, and these courts have concurrent jurisdiction.<sup>1</sup>

Parties appointed as assignees of an insolvent firm, in a proceeding in insolvency which was illegal and void, are merely the custodians, receivers, or bailees of the fund in their hands, by virtue of the order of the court, and only hold it subject to the order of the court.<sup>2</sup>

Consequently, when in another proceeding for the protection of the creditors' property, instituted by one of the insolvent firm against his partners, in the same court, an order is made that they pay over the fund to a receiver appointed by the court, it is no answer or defence, that the fund has been attached in their hands in actions brought by the creditors, or that it had been attached in the hands of a former receiver, appointed by the same court, from whom they, under a like order, had received it.<sup>2</sup>

Nor is the disposition of the fund affected by any action of the immediate parties to the action, which was instituted to secure a distribution of the assets among the creditors—an object which a court of chancery will carry out, without regard to any attempt by any of the partners to evade or defeat it.<sup>2</sup>

An application for a discharge in insolvency, is a special proceeding in the nature of an action. The petition schedule and affidavit are the pleadings on the part of the petitioner, who is the plaintiff; and if they are sufficient to entitle him to his discharge, any irregularity or defect in form must be taken ad-

<sup>1</sup> Harper v. Freelon, 6 Cal. 76.

<sup>2</sup> Adams v. Haskell, 6 Cal. 118.

vantage of before judgment, by his creditors, who are defendants in the proceeding.<sup>1</sup>

The judgment, if not reversed on appeal, is conclusive between the parties.<sup>2</sup>

An insolvent's discharge must be by judgment of the court, entered in the same county in which the proceeding is instituted.<sup>3</sup>

A discharge made by the district judge at chambers in the same district, but in another county, is void.<sup>4</sup>

The date of publication of notice to creditors, under our Insolvent Act, is the first day on which the notice is published.<sup>5</sup>

The fact that the court was adjourned, though not for the term, at the time set for the hearing of objections of creditors, and that the hearing took place before the judge, is no objection to the regularity under the statute.<sup>6</sup>

The insolvent law is not obnoxious to any provision of the Constitution.<sup>7</sup>

When the estate of an insolvent is subject to liens or mortgages, created before the application in insolvency, proceedings therein do not affect such liens or mortgages, and the right of the assignees is confined to the surplus.<sup>8</sup>

The provisions of the fourteenth section of the Insolvent Act, providing that all suits brought against the insolvent debtor anterior to his surrender of property, shall be transferred to the court in which said insolvent shall have presented his schedule, does not apply to suits brought for the enforcement of prior liens or mortgages.<sup>9</sup>

A party who seeks the benefit of the Insolvent Law, must comply strictly with its provisions.<sup>10</sup>

Where an insolvent was liable on a note made by S., to him, and by him endorsed to R., and by him over to M., and describes the same in his schedule, viz: "To R., I am contingently liable for one thousand dollars and interest, as endorser for one S., upon a promissory note, made and executed by said S., to said R.;" *Held*, that the description was insufficient, for inaccuracy, and that his discharge in insolvency is no bar to a recovery on the note.<sup>11</sup>

<sup>1</sup> Kohlman v. Wright, 6 Cal. 280.

<sup>2</sup> Turner v. McIlhenny, 6 Cal. 287.

<sup>3</sup> Clarke v. Ray, 6 Cal. 600.

<sup>4</sup> Rix v. McHenry, 7 Cal. 89.

<sup>5</sup> McAllister v. Strode, 7 Cal. 426; Judson v. Atwill, 9 Cal. 477.

O O

The petition in insolvency must state the name of each creditor, if known, and if unknown, such fact must be stated.<sup>1</sup>

A joint application of two partners for the benefit of the Insolvent Act is void, there being no authority for such applications in the act.<sup>2</sup>

A schedule attached to such a petition, showing a surrender of all the joint property of the partners, is not a compliance with the act, which requires a surrender of all the property of the insolvent.<sup>3</sup>

A discharge under the Insolvent Act, to be a bar to actions on indebtedness mentioned in the petitioner's schedule, must be in strict conformity with the various provisions of the law; otherwise it is void.<sup>4</sup>

Where an insolvent, after his discharge, expressly promises his creditor to pay his debt, it can be enforced, the debt being a sufficient consideration to support the subsequent promise.<sup>5</sup>

A verbal promise is sufficient, as our statute has not changed the common law rule.<sup>6</sup>

A party whose assets are forty per cent. above his liabilities, cannot be considered insolvent.<sup>7</sup>

An order of court made staying all proceedings against a petitioner under the Insolvent Law, for a discharge of his debts—pending his petition, would not prevent the issuance of an execution on a judgment rendered against the petitioner, and a sale of property under the same, within the time limited for the lien of said judgment.<sup>8</sup>

A decree of discharge, under the Insolvent Act, from the payment of a note secured by mortgage, does not release the lien of the mortgage; it only operates to limit the recovery of the mortgagee to the proceeds of the mortgaged premises.<sup>9</sup>

The object of the thirty-ninth section of the "Act for the Relief of Insolvent Debtors and Protection of Creditors," which provides that no assignment of any insolvent debtor otherwise than as provided in that act, shall be legal or binding upon creditors, was to do away with all voluntary assignments by a debtor in failing circumstances, for the benefit of his creditors.<sup>10</sup>

<sup>1</sup> *McAllister v. Strode*, 7 Cal. 433; *Judson v. Atwill*, 9 Cal. 477.

<sup>2</sup> *Meyer v. Kohlman*, 8 Cal. 44.

<sup>3</sup> *Feeny v. Daly*, 8 Cal. 84.

<sup>4</sup> *Hunt v. his creditors*, 9 Cal. 45.

<sup>5</sup> *Isaac v. Swift*, 10 Cal. 71.

<sup>6</sup> *Luning v. Brady, et al.* 10 Cal. 206.

<sup>7</sup> *Dana v. Stanford, et al.* 10 Cal. 262.

It was never intended to prevent an insolvent debtor from transferring his property directly to his creditor, either absolutely in payment of his debts, or as security by way of mortgage.<sup>1</sup>

A conveyance giving a preference, is not fraudulent, though the debtor be insolvent, and the creditor be aware at the time that it will have the effect of defeating the collection of other debts. To avoid the conveyance, there must be a real design on the part of the debtor to prevent the application of his property, in whole or in part, to the satisfaction of his debts. A creditor violates no rule of law, when he takes payment or security for his demand, though others are thereby deprived of all means of satisfaction of their own equally meritorious claims.<sup>2</sup>

Where a debtor, who was at the time insolvent, executed a mortgage of all his property and effects to certain specified creditors, to secure his indebtedness to them, and to protect them from liabilities incurred by their endorsement of his paper: *Held*, that the mortgage was not an assignment either within the letter or spirit of the thirty-ninth section of the "Act for the Relief of Insolvent Debtors and Protection of Creditors," and did not create a trust for the use of the mortgagor, prohibited by the statute of frauds.<sup>3</sup>

On a petition for a discharge from the debts of the petitioner, under the Insolvent Act, it is unnecessary for the petitioner to allege that his debts were created in this state. The courts do not owe their jurisdiction, in insolvency cases, to an averment in the petition that the debts of the insolvent arose in this state.<sup>4</sup>

A defective statement in the schedule of an insolvent, of certain promissory notes which constitute a portion of his debts and liabilities, does not invalidate the entire proceedings. If the statute, as to the particularity with which debts and liabilities are required to be set forth by the insolvent, is not substantially complied with, a creditor cannot be prejudiced by the decree of discharge in any suit which he may institute to enforce his claim.<sup>5</sup>

There is no rule of law which prevents a debtor, in insolvent

<sup>1</sup> *Dana v. Stanfords, et al.* 10 Cal. 269.

<sup>2</sup> *Slade v. his creditors*, 10 Cal. 488.

<sup>3</sup> *Sharp v. his creditors*, 10 Cal. 418.

circumstances, from the application of his property to the payment of one debt rather than another.'

Where it is shown that an insolvent, shortly before his application, made and caused to be recorded a deed of property, to withhold it from his schedule with a view to defraud his creditors, the proof of fraud is complete without proof of an actual delivery of the deed.'

## FORMS.

*Petition in Insolvency.*

In the District Court of the Twelfth Judicial District, City and County of San Francisco.

John Doe  
    *against*  
his Creditors. }

To the Honorable Edward Norton, Judge of the District Court of the Twelfth Judicial District of the State of California:

The petition of John Doe respectfully shows: That your petitioner is domiciled and now and usually a resident in the said city and county, and within the twelfth judicial district of the state of California, wherein your honor has original jurisdiction. That in consequence of losses in business, bad contracts, bad debts, interest paid, rents, clerk hire, expenses, fires, shipments of merchandise and its depreciation, and as endorser, your petitioner has become and is insolvent, and utterly unable to pay his debts, and is an insolvent debtor within the true intent and meaning of the act entitled "An act for the Relief of Insolvent Debtors and Protection of Creditors," passed May 4th, 1852, and being desirous of having the estate, property and effects of your petitioner applied to the payment of his debts and liabilities proportionally and without preference to any, he, for that purpose, surrenders his property in pursuance of the provisions of said act.

The schedule annexed, marked "A," contains a summary statement of the affairs of your petitioner, with a list of the losses he has sustained.

The schedule hereunto annexed, marked "B," contains the names of his creditors, as near as he can now state them, and the amount due to each creditor, the cause and nature of said indebtedness, and when it accrued, and a statement of any existing judgment, mortgage, collateral or other securities, for the payment of any such debt.

The schedule hereunto annexed, marked "C," contains a full, complete and perfect inventory of all the property, real, personal

<sup>1</sup> Randall v. Buffington and wife, 10 Cal. 491.

<sup>2</sup> Flahe v. his creditors, January Term, 1859.

and mixed, estimated as nearly as possible at its true cash value, and all moneys on hand of, or belonging to your petitioner, and also a statement of all incumbrances existing upon said property, or any portion thereof.

The schedule "D" contains a full statement and inventory of all the choses in action, debts due, or to become due to your petitioner, all of which are therein estimated as nearly as possible at their true cash value.

Wherefore your petitioner prays to make a cession of his estate, and to be discharged from his debts in pursuance of the provisions of said act.

Dated this 12th day of August, A. D. 1858. JOHN DOE,  
By WILLIAMS & BROWN, his Attorneys.

*Oath of Insolvent.*

District Court of the Twelfth Judicial District, City and County of San Francisco.

John Doe  
against  
his creditors. }

I, John Doe, do, in the presence of Almighty God, truly and solemnly swear, that the schedule now delivered by me doth contain a full, perfect and true discovery of all the estate, real, personal and mixed goods and effects, to me in any way belonging; all such debts as are to me owing or to any person or persons in trust for me, and all securities and contracts, whereby any money may hereafter become payable, or any benefit or advantage accrue to me or my use, or to any other person or persons in trust for me; that I have no lands, money, stock or estate, reversion or expectancy, besides that set forth in my schedule; that I have in no instance created or acknowledged a debt for a greater sum than I honestly and truly owed; that I have not directly or indirectly sold or otherwise disposed of in trust, or concealed any part of my property, effects or contracts; that I have not in any way compounded with my creditors, whereby to secure the same, or to receive or to expect any profit or advantage therefrom, or to defraud or deceive any creditor to whom I am indebted, in any manner whatever. So help me God.

JOHN DOE.

Subscribed and sworn to before me, this 12th day of August, 1858. EDWARD NORTON,

District Judge, Twelfth Judicial District.

SCHEDULE A.

REFERRED TO IN THE FOREGOING PETITION, AND FORMING PART THEREOF.

A summary statement of petitioner's affairs, and a list of losses he has sustained:

Capital stock commencing business as a merchant at San Francisco, A. D. 1857	-	-	-	\$10,000 00
Profits	-	-	-	16,000 00
Total	-	-	-	\$26,000 00
Value of real estate as per schedule C, annexed	-	-	-	\$4,000 00
Value of merchandise on hand as per schedule C	-	-	-	1,500 00
Amount of debts due to the petitioner as per schedule D	-	-	-	800 00
Losses on depreciation on merchandise	-	-	-	6,000 00
Paid for interest as per balance of inter- est account	-	-	-	-
Paid for rent and other expenses as per expense account	-	-	-	-
Paid for personal and family expenses	-	-	-	3,500 00
Loss on	-	-	-	-
Loss by destruction of goods by fire	-	-	-	8,000 00
Loss by endorsing note for Wm. Cook	-	-	-	5,000 00

SCHEDULE B.

Referred to in the annexed Petition and forming a part thereof, giving the names of his creditors so far as known, the amount due each creditor, and the cause and nature of such indebtedness, and when it accrued, and a statement of every existing judgment, mortgage, collateral or other security for the payment of any such debt.

Names of Creditors.	Amount.	Cause of Indebtedness.	Nature of Indebtedness.	When it Accrued.	Every existing judgment, mortgage, collateral or other security, for the payment of said debts.
Wm. Brown.	\$1,000 00	Money borrowed.	Promissory Note dated May 1, 1858, for \$10,000, payable thirty days after date, interest two and a half per cent. per month.	May 1st, 1858.	
Price & Co.	600 00	Groceries purchased.	Book Account.	April 15th, 1858.	Judgment rendered in the 13th district court, May 20th, 1858, for \$540 25 cents.
Sam. Kee & Co.	5,000 00	Purchase of Rice.	" "	May 10th, 1858.	

## SCHEDULE C.

REFERRED TO IN THE FOREGOING PETITION, AND FORMING PART THEREOF.

A full, complete and perfect inventory of all the petitioner's property, real, personal and mixed, estimated as nearly as possible at the true cash value. All money on hand, of said insolvent, with a full statement of all the incumbrances existing on the property of the insolvent.

## REAL ESTATE.

A lot of land and tenement thereon, situated northwest corner of Brannan and Second streets, 25x80 feet, claimed as homestead, - - - \$4,000 00

## MIXED ESTATE.

Twelve hundred boxes of tea, - - - 1,500 00

## PERSONAL PROPERTY.

Household furniture, - - - 200 00  
 Petitioner's clothing and wearing apparel, - - 50 00  
 Wearing apparel of family, viz. : wife and one child, - 150 00

## SCHEDULE D.

Referred to in the annexed Petition and forming part thereof, containing a full statement and inventory of all the choses in action, debts due and to become due to Petitioners.

Name of debtor.	Amount	Cause of indebtedness.	Nature of indebtedness.	When it accrued.	Their cash value.	Collateral security for the payment, and general remarks.
S. Jones.	\$400 00	Goods sold.	Book account.	Feb. 1st, 1858.	\$400 00	
Wm. Pierce.	150 00	Money loaned.	Note dated May 15th, 1859, payable sixty days after date, interest one and a half per cent. per month.	May 15th, 1859.	150 00	
Jno. Clark.	150 00	Goods sold.	Book account.	Jan. 15th, 1859.	250 00	

*Certificate to Schedule.*

In the District Court of the Twelfth Judicial District, in and for the City and County of San Francisco :

John Doe }  
*against*  
 his Creditors. }

City and County of San Francisco, ss.

The within and foregoing petition and schedule of John Doe, *vs.* his creditors hereto attached, having been now this day duly



signed and sworn to before me, by the said insolvent, John Doe, I hereby certify the same as such, and order that they be filed in the office of the clerk of this court, in this county, there to remain for the information of creditors.

Dated, San Francisco, this twelfth }  
day of August, 1858.

EDWARD NORTON,  
District Judge, Twelfth Judicial District.

*Order to show Cause and Stay of Proceedings.*

In the District Court of the Twelfth Judicial District, of the State of California, in and for the City and County of San Francisco:

John Doe }  
against  
his Creditors. }

Upon reading and filing the petition, schedules and oath of the above-named insolvent, and on motion of Williams & Brown, of counsel for said petitioner, it is ordered that all the creditors of the said insolvent, John Doe, be and appear before the Honorable Edward Norton, aforesaid judge of the District Court, of the twelfth judicial district, in open court, at the court-room of said court in the city and county of San Francisco, on the twenty-fifth day of September, A. D. 1858, at 10 o'clock, A. M., of that day, then and there to show cause, if any they can, why the prayer of said insolvent should not be granted, and an assignment of his estate be made, and he be discharged from his debts and liabilities, in pursuance of the statute in such case made and provided.

And it is further ordered that in the mean time all proceedings against said insolvent be stayed.

And it is further ordered that the clerk of this court issue a notice, calling the creditors to appear, at the time and place and for the purposes aforesaid; that such notice be published at least thirty days in a newspaper published in the county aforesaid, if there be one, if there be none, then in a newspaper printed nearest to that county.

EDWARD NORTON,  
District Judge, Twelfth District.

*Notice from Court to Creditors.*

In the District Court of the Twelfth Judicial District, of the State of California:

In the matter of the petition of }  
John Doe, an Insolvent Debtor. }

Pursuant to an order of the Honorable Edward Norton, judge of the said District Court, notice is hereby given to all the cred-

itors of the said insolvent, John Doe, to be and appear before the Honorable Edward Norton, aforesaid, in open court, at the court-room of said court, in the city and county of San Francisco, on the twenty-fifth day of September, A. D. 1858, at 10 o'clock, A. M., of that day, then and there to show cause, if any they can, why the prayer of said insolvent should not be granted, and an assignment of his estate be made, and he be discharged from his debts and liabilities, in pursuance of the statute in such case made and provided: and in the mean time all proceedings against said insolvent be stayed.

[L. s.] Witness my hand and the seal of said court, this {  
twelfth day of August, A. D. 1858. }

WM. DUER, Clerk.

WM. R. SATTERLEE, Deputy Clerk.

*Affidavit of Publication of foregoing Notice.*

State of California,  
City and County of San Francisco, }

Robert White, book-keeper and principal clerk, in the office of the *San Francisco Herald*—a daily and weekly newspaper, published in said city and county, being duly sworn, deposes and says, that the notice, of which the annexed printed notice is a copy, has been published in said paper at least thirty days, commencing on the thirteenth day of August, 1858, and ending on the twenty-fifth day of September, 1858.

Subscribed and sworn before me this {  
twenty-fifth day of September, 1858. }

JOE BLACK, Notary Public.

*Assignment in Insolvency.*

This indenture, made this twenty-fifth day of September, A. D. 1858, between John Doe of San Francisco, an insolvent debtor, party of the first part, and Charles Doane of San Francisco, sheriff of the city and county of San Francisco, party of the second part, witnesseth, that whereas the said party of the first part, on the twelfth day of August, A. D. 1858, presented to the Hon. Edward Norton, judge of the twelfth judicial district court [being the judge having original jurisdiction within the said district, of which the said party of the first part, was then, and still is a resident], his petition, briefly stating the circumstances which compelled him to surrender his property to his creditors, and concluding with a prayer to make a cession of his estate, and to be discharged from his debts, in pursuance of the provisions of the "Act for the Relief of Insolvent Debtors and Protection of Creditors," passed May 4, 1852, annexing to said petition the schedules, and making the oath required by said act: and such proceedings having been thereupon had in due form of law, that

on the twenty-fifth day of September [the creditors, although duly summoned, not having attended on the day appointed for their meeting, and refusing to appoint one or more assignees,] the said judge did, by order then duly made, authorize the sheriff of the city and county of San Francisco to receive the surrender of property offered by the debtor, and to perform, in every respect, the functions of assignee; and for the faithful performance of said trust, to be responsible on his official bond:

Now, therefore, in consideration of the premises, and of the benefit of said act, and in pursuance of and in obedience to the above-recited order and the said act, the said party hereto, of the first part, hath assigned, transferred and set over, and by these presents doth assign, transfer, and set over, unto the said party of the second part, his successor, successors or assigns, all and all manner of goods, chattels, debts, moneys, and all other things, property, estate and effects of the said party of the first part, real, personal and mixed, of what kind, nature or quality soever, and wheresoever the same may be situated, and whether in possession, reversion, remainder or in action, at the time of presenting his petition,

To have and to hold the same and every part and parcel thereof, unto the said party of the second part, his successor, successors and assigns, forever, to and for the uses and purposes in the said act declared.

In witness whereof, the said party of the first part hath hereto set his hand and seal, the day and year first above written.

JOHN DOE. [L. S.]

*Assignee's Certificate.*

In the District Court of the Twelfth Judicial District.

State of California,	} ss:
City and County of San Francisco,	
John Doe	}
against	
his Creditors.	

'I hereby certify that John Doe has duly executed, under his hand and seal, and duly acknowledged before an officer authorized to take acknowledgments of deeds, and delivered to me an assignment of all his estate, real, personal and mixed, for the benefit of his creditors, in pursuance of an order of the District Court of the twelfth Judicial District, made on the 25th day of September, A. D. 1858, and that he has delivered to me all the goods, claims, effects and estates, assets, choses in action, evidences of debt, accounts, notes, bills and muniments of title, declared by said insolvent in his schedule, or relating to the property and effects therein set forth.

Dated September 25th, A. D. 1858.

CHARLES DOANE, Assignee of said Insolvent.

*Order of Discharge for Insolvent.*

State of California.

In the District Court of the Twelfth Judicial District.

In the matter of the application of John Doe  
for the benefit of the Act for the relief of  
insolvent debtors and protection of cred-  
itors, passed May 4th, 1852.

City and County of San Francisco, ss:

Whereas the said petitioner, domiciled and usually residing in the city of San Francisco, in the county of San Francisco, and within the twelfth judicial district, did on the twelfth day of August, A. D. 1858, petition the judge of the District Court of the twelfth judicial district, having original jurisdiction within the county aforesaid, briefly stating the circumstances which compelled him to surrender his property to his creditors and praying to make a cession of his estate, and to be discharged from his debts in pursuance of the provisions of an act entitled "An Act for the Relief of Insolvent Debtors and Protection of Creditors," passed May 4th, 1852; and the said petitioner having annexed to and filed with his said petition a schedule of his affairs, as required by the 3d and 6th section of said act, by him signed and sworn to before the said judge, the said petition and schedule were thereupon certified by said judge and by him caused to be filed in the office of the clerk of said court, in the county aforesaid, there to remain for the information of the creditors, and upon receiving which said petition, schedule and affidavit, the judge thereupon, to wit: on the twelfth day of August, A. D. 1858, made an order requiring all the creditors of said insolvent to show cause, if they could, on Saturday, the twenty-fifth day of September, A. D. 1858, before the said judge, in open court, at the court-house thereof in said county, why an assignment of said insolvent's estate should not be made, and he be discharged from his debts, and did then and there direct the clerk of said court to issue a notice calling the creditors of said insolvent to be and appear within thirty days from the date of the publication of such notice, before said judge at chambers or in open court, to show cause why the prayer of said insolvent should not be granted; in pursuance whereof the said clerk did issue a notice calling them to appear in the said court on the twenty-fifth day of September, A. D. 1858, on which day, it appearing to the satisfaction of the court, upon affidavit filed, that the notice to the creditors of said insolvent had been regularly published in pursuance of said order, and no creditors of said insolvent appearing, upon motion of the petitioner's counsel, it was ordered that the sheriff of the county be authorized to receive

the surrender of property offered by the said insolvent debtor, and to perform in every respect the functions of assignee.

Now, at this day, to wit: on Saturday, the fifteenth day of November, A. D. 1858, it appearing to the satisfaction of the court that ten days have fully elapsed since the appointment or authorization of said sheriff to act as assignee, and that no written opposition by any of the creditors of said insolvent, to the appointment of said assignee or to the surrender of said petitioner's property, or the discharge of insolvent, has been filed or laid before the court, and that said surrender has been made according to the provisions of said act, and that the requirements of said act for the relief of insolvent debtors and protection of creditors, and all the orders of the court herein, have in every respect been fully complied with and performed by the said petitioner.

Upon application and motion of counsel, it is ordered, adjudged and decreed that said insolvent debtor be and is hereby released and fully discharged from any and all such debts and liabilities as are set forth and named in his said schedule, which were contracted before the surrender of his estate under the provisions of the aforesaid act, and contracted after the passage of said act, and from every judicial proceeding relative to the same.

EDWARD NOETON,

District Judge, Twelfth Judicial District.

*Deed in Bankruptcy.*

In the District Court  
State of California,  
County of

Judicial District :

A. B.  
against  
his Creditors.

This indenture, made this                      day of                      , 1857, between C. D.                      sheriff of the county of                      , assignee of A. B., the above-named insolvent, of the first part, and M. N., of the second part: Whereas, by virtue of an order in the above cause, tested the first day of March, 1857, I was authorized to sell at public auction all the property of said insolvent of whatsoever nature or kind, as by said order and papers on file, reference being thereunto had, will more fully appear; by virtue of said order I did on the fifteenth day of April, 1857, sell all the right, title and interest of the said insolvent in and to the premises hereafter described, at public auction, according to the statute in such case made and provided—at which sale the right, title and interest of said insolvent in and to the following prem-

ises were struck off and sold to O. P., for the sum of one thousand dollars, he, the said O. P., being the highest bidder, and that being the highest sum bidden for the same.

Now this indenture witnesseth, that I, C. D., sheriff as aforesaid, and assignee of said insolvent, by virtue of said order, and in pursuance of the statute in such case made and provided, for and in consideration of the sum of money above mentioned, to me in hand paid, as aforesaid, the receipt whereof is hereby acknowledged, have granted, sold, conveyed, and by these presents do grant, bargain, sell, convey and confirm unto the said O. P., his heirs and assigns, all the estate, right, title and interest of A. B., the said insolvent, in and to the following described property, to wit:

*[Here insert description.]*

together with all and singular the hereditaments and appurtenances thereunto belonging, or in anywise appertaining, to have and hold, the said above mentioned and described premises, with the appurtenances, unto the said O. P., his heirs and assigns, forever, as fully and absolutely as I, C. D., assignee as aforesaid, can, may or ought to, by virtue of the said order and of the statute in such cases made and provided, grant, bargain, sell, release, assign, convey and confirm the same.

In witness whereof I, the said assignee, have hereunto set my hand and seal, the day and year first above written.

Sealed and delivered in } presence of K. L.	C. D., [L. s.] Assignee of A. B.
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*Order for Payment of Dividend.*

District Court of John Short <i>against</i> his Creditors, William Pluck <i>against</i> his Creditors.	}      }	, Judicial District, County of	:
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The orders heretofore made, requiring the creditors of said insolvents to show cause why the statements deposited by the assignee in the clerk's office of this court should not be accepted, and distribution made, being returnable this day, and this being the day for showing cause as aforesaid, and it appearing to the court that fifteen days' notice had been given according to law, and no cause being shown why a distribution should not be made, and it also appearing to the court that the sum of seven thou-

said thirty-three and 99-100 dollars mentioned in said statement to be distributed, is the same money mentioned in the statements filed and deposited in each of said causes, and that the creditors and the sums and claims due each, are the same creditors and claims mentioned in each statement. It is therefore ordered that said assignee pay over to the creditors of said insolvents, John Shaw and William Pluck, eighteen per cent. of their several claims as set forth in the statements filed in the above causes; that is to say:

To A. B. the sum of	-	-	-	-	-	\$324 14
To C. D. the sum of	-	-	-	-	-	352 38
&c., &c.						

For forms relating to homestead exemption, in favor of insolvent, see title HOMESTEAD.

## CHAPTER XXIV.

## JURORS.

## STATUTORY PROVISIONS.

A PERSON shall not be competent to act as juror unless he be:

1. A citizen of the United States.
2. An elector of the county in which he is returned.
3. Over twenty-one and under sixty years of age; and,
4. In the possession of his natural faculties.
5. Nor shall any person be competent to act as juror who has been convicted of a felony or misdemeanor involving moral turpitude.<sup>1</sup>

Every white male citizen of the United States, and every white male citizen of Mexico who shall have elected to become a citizen of the United States under the treaty of peace exchanged and ratified at Queretaro, on the thirtieth day of May, one thousand eight hundred and forty-eight, of the age of twenty-one years, who shall have been a resident of the state six months next preceding the election, and the county or district in which he claims his vote, thirty days, shall be entitled to vote at all elections which are now or hereafter may be authorized by law.<sup>2</sup>

For the purpose of voting, no person shall be deemed to have gained or lost a residence by reason of his presence or absence, while employed in the service of the United States, nor while engaged in the navigation of the waters of this state or of the United States, or of the high seas; nor while a student of any seminary of learning; nor while kept at any almshouse or other asylum, nor while confined in any public prison.<sup>3</sup>

No idiot or insane person, or person convicted of any infamous crime, shall be entitled to the privileges of an elector.<sup>4</sup>

Absence from the state on business of the state, or of the

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<sup>1</sup> Wood's Dig. art. 2693.

<sup>2</sup> Id. 2190-2194.



United States, shall not affect the question of residence of any person.<sup>1</sup>

A crime shall be deemed infamous which is punishable by death or by imprisonment in the state prison.<sup>2</sup>

A person shall be exempt from liability to act as a juror, if he be: 1. A judicial officer. 2. Any other civil officer of this state, or of the United States, whose duties are at the time inconsistent with his attendance as a juror. 3. An attorney or counselor. 4. A minister of the gospel or a priest of any denomination. 5. A teacher in a college, academy or school. 6. A practising physician. 7. An officer, keeper, or attendant of an almshouse, hospital, asylum, or other charitable institution, created by or under the laws of this state. 8. Any person engaged in the performance of duty, as officer, keeper or attendant of any county jail, or of the state prison. 9. A captain, master or other officer, or any person employed on board of a steamer, vessel, or boat, navigating the waters of this state, and keepers of public ferries.<sup>3</sup>

Any person may be excused from acting as a juror, when for any reason, his interests, or those of the public, will be materially injured by his attendance, or when his own health or the death or sickness of a member of his family requires his absence.<sup>4</sup>

The officers and members of any fire company, regularly attached to the fire department of any city, town or village within the state, organized according to ordinance of such city, town or village, shall be exempt from militia service and jury duty, except as hereinafter provided.<sup>5</sup>

The officers and members of any company in said fire department, shall be exempt from military duty, except in cases of war, invasion, or insurrection.<sup>6</sup>

It shall be the duty of each person claiming exemption from military or jury duty under the provisions of this act, to produce, if required by the officer serving a jury or militia notice, a certificate of his active membership to the fire department or company to which he is attached, signed by the chief engineer, secretary of the board of delegates of the fire department, fore-

<sup>1</sup> Wood's Dig. art. 2120-2124.

<sup>2</sup> Id. 2517, 2518.

<sup>3</sup> Id. art. 2700, 2701.

man of the company, or chief magistrate of the city, town or village.<sup>1</sup>

The officer serving the jury summons or militia notice, may require the oath of the party summoned or notified, before any magistrate, that he has not resigned, been expelled, or forfeited his membership of the company or department, since the date of his certificate.<sup>1</sup>

When fire companies are formed in unincorporated and unorganized towns and villages, the members thereof shall be entitled to all the rights and privileges of "An Act to exempt Firemen from Militia Service and Jury Dnty," passed March twenty-fifth, one thousand eight hundred and fifty-three.<sup>2</sup>

All active members of uniformed volunteer companies of this state, mustered into service of the state, under the provisions of the laws thereof, shall be exempt from jury duty.<sup>3</sup>

The grand jury is composed of sixteen members.<sup>4</sup>

A grand jury may be ordered by the presiding judge of the Court of Sessions, before the commencement of the term, when it shall appear to him necessary, or when petitioned to that effect by twenty or more electors of the county. The jury so ordered is drawn by the county clerk, in presence of the county judge and the sheriff, out of thirty names, copied by them from the assessment-roll, a week's notice of the drawing having been given by the sheriff.<sup>5</sup>

If, after the term of the court be commenced, it shall appear proper to the presiding judge that a grand jury should be summoned, he shall cause an order for the same to be entered upon the minutes, a copy of which is delivered to the sheriff, who proceeds immediately to summon sixteen persons from the body of the county list—not from the bystanders.<sup>6</sup>

When an assessment-roll has not been returned, so that a jury cannot be drawn, the court, on the first day of the term, may enter an order directing the sheriff to summon sixteen persons, from whom the jury shall be empanelled.<sup>7</sup>

If an offence be committed during the sitting of the court,

<sup>1</sup> Wood's Dig. art. 2517, 2518.

<sup>2</sup> Id. 2523.

<sup>3</sup> Id. 2522.

<sup>4</sup> Laws 1859, pp. 184 and 186.

<sup>5</sup> Wood's Dig. art. 2702; Laws 1859, p. 184.

<sup>6</sup> Wood's Dig. art. 2704; Laws 1859, p. 184.

<sup>7</sup> Wood's Dig. art. 300-204; Laws 1859, p. 186.

after the discharge of the grand jury, the court may, in its discretion, order sixteen persons to be summoned, from a list of which, upon its return by the sheriff, the clerk shall draw a grand jury.<sup>1</sup>

The mode of summoning juries is, by giving written notice to each of them personally, or by leaving such notice at his place of residence, with some person of suitable age and discretion.<sup>2</sup>

The sheriff makes his return on the day appointed, the persons summoned and the manner in which each was notified.<sup>3</sup>

If the full number of competent persons be not thus obtained, the sheriff is ordered to summon a sufficient number to complete the grand jury.<sup>4</sup>

The provisions in reference to the challenge of grand jurors and their powers and duties are found in Wood's Digest, from page 284 to 287.

A trial jury for every general term of the District Court, and of the Court of Sessions, is drawn and summoned in the same manner as a grand jury.<sup>5</sup>

The court may impose a fine not exceeding one hundred dollars (in city or justices' courts fifty dollars) for each day the juror shall, without cause, neglect to attend. If, however, the notice was not personally served, the juror shall first have an opportunity, on an order to show cause, to be heard.<sup>6</sup>

A trial jury is summoned for a county court, recorder's court, mayor's court, or justice's court, when specially ordered by the court. For the county court the jurors are summoned from the county by the sheriff, for the recorder's or mayor's court from the city by the marshal, and for the justice's court from the city or township by the constable of the court.<sup>7</sup>

For coroner's jury see chapter on CORONERS.

The foregoing provisions in regard to the mode of drawing jurors do not apply to the city and county of San Francisco.

By a special act relating to San Francisco county it is provided that the supervisors shall annually, between the first Monday of January and the first of April, apportion among their several

<sup>1</sup> Wood's Dig. art. 197-199; Laws 1859, p. 186.

<sup>2</sup> Wood's Dig. art. 2702, § 6.

<sup>3</sup> *Id.* § 7.

<sup>4</sup> *Id.* 2708; Laws 1859, p. 184.

<sup>5</sup> Wood's Dig. art. 2705, 2706, and 260.

<sup>6</sup> *Id.* 2708, 2708.

<sup>7</sup> *Id.* 2708, 2709.

districts from four hundred to five hundred persons to be returned as grand jurors, and from twelve hundred to fifteen hundred as trial jurors.<sup>1</sup>

The names of a number of persons equal to the number so apportioned to each district for grand jurors and trial jurors are taken from the poll list of that year by the supervisor of the district, during the first week in April.

And the whole list of grand jurors and the whole list of trial jurors are revised by the board and certified, and are filed with the county clerk.<sup>2</sup>

The names thus selected are written upon ballots, closely folded, and placed in two boxes, one for the grand jury, and one for the trial jury, from which the grand and trial juries, respectively, are drawn by lot, by the county clerk, in the presence of the sheriff, and at least two witnesses named by the court.<sup>3</sup>

If any of the persons whose names are drawn, are excused by the court from serving, or are temporarily disqualified, their ballots are returned to the box; but the ballots containing the names of those who serve and those permanently disqualified or exempt are destroyed.<sup>4</sup>

It is further provided, however, that whenever a court or judge in San Francisco, upon ordering a jury, may be of opinion that a jury cannot be readily obtained under the special act, he may set forth such opinion in his order, and thereupon a jury may be obtained according to the general act.<sup>5</sup>

#### FORMS.

##### *Certificate of Drawing a Jury.*

State of California, }  
County of }

In pursuance of an order issued by the Hon. \_\_\_\_\_,  
County Judge of \_\_\_\_\_ county, dated \_\_\_\_\_,  
A. D. \_\_\_\_\_, directed to, and ordering the sheriff of  
\_\_\_\_\_ county to summon a trial jury for the \_\_\_\_\_ term, A. D. \_\_\_\_\_, of the  
Court of Sessions of said county, to be held on the &c., &c.,  
said trial jury to be in attendance on said court on &c., &c.

We, the undersigned, county judge, county clerk, and sheriff,

<sup>1</sup> Laws 1837, p. 168.

<sup>2</sup> Id. 190.

<sup>3</sup> Id. 191; Id. 1838, p. 170.

<sup>4</sup> Id. 1838, p. 170, 171.

<sup>5</sup> Id. 1838, p. 191.

proceeded to copy from the assessment roll of the said county, the names of thirty persons, to wit: A., B., C., D., &c., &c.

In witness whereof we have hereunto set our hands, this  
day of            A. D.            M. N., County Judge.  
O. P., County Clerk.  
R. S., Sheriff, &c.

State of California, }  
County of . }

We, \_\_\_\_\_, county judge, \_\_\_\_\_, county clerk, and \_\_\_\_\_, sheriff of the county of \_\_\_\_\_ state of California, met at the chambers of the county judge, in \_\_\_\_\_ on the \_\_\_\_\_ day of \_\_\_\_\_, A. D. \_\_\_\_\_, at \_\_\_\_\_ o'clock, in pursuance of the order of the county judge and notices given by said sheriff, proceeded and placed in a box prepared by the county clerk, the names of the before-named thirty persons, each name being on a separate piece or slip of paper.

The said county clerk, in the presence of the county judge, and the said sheriff, drew from the box the names of twenty-four persons, to serve as trial jurors, until discharged, in the said court, to wit: A., B., C., D., E., F., &c., &c.

In testimony whereof we have hereunto affixed our names,  
this       day of                  , A. D.                  .  
County Judge.  
County Clerk.  
Sheriff.

*Order of Summoning a Grand Jury.*

Court of Sessions of the County }  
of \_\_\_\_\_, Term, A. D. \_\_\_\_\_.

Whereas the presiding judge of this court, before the present session of said court, did not deem it necessary that a grand jury should be summoned, and no petition signed by any of the electors of this county, asking that a grand jury should be summoned, was presented to said judge, and no grand jury was summoned for the present session of said court, either before or since the commencement of the said present session of said court, and no grand jury is now empanelled,

And whereas, after the announcement of the session of said court, at the present term thereof, it now appears proper to the said judge of the said court, that a grand jury should be summoned.

It is, therefore, ordered, by the direction of the presiding judge of this court, that a grand jury be summoned for the present term of said Court of Sessions, and that the sheriff of the county of \_\_\_\_\_, summon sixteen persons from the body of the county, and not from the bystanders, to appear before the

said Court of Sessions of the county of \_\_\_\_\_, at the court-room thereof, at &c. &c., on the \_\_\_\_\_ day of \_\_\_\_\_, A. D. \_\_\_\_\_, at \_\_\_\_\_ o'clock of said day, to form such grand jury, according to the statute in such case made and provided.

Dated, \_\_\_\_\_

[L. s.]

M. N., County Judge.

Attest, A. B., Clerk.

*Order for Summoning a Trial Jury.*

Court of Sessions of the }  
County of \_\_\_\_\_, }

Term.

Whereas no trial jury has been ordered or summoned for the present \_\_\_\_\_ term of this court, and by reason of certain criminal cases being now at issue and undetermined in this court, which ought to be brought to trial without delay, it has become necessary during this term, that a trial jury should be empanelled,

It is, therefore, ordered by this court, that the sheriff of the county of \_\_\_\_\_, do summon from the citizens of the said county, but not from the bystanders, &c., &c. [same as above].

[L. s.]

M. N., County Judge.

Attest, A. B., Clerk.

*Petition for Summoning a Grand Jury.*

To the Honorable \_\_\_\_\_, Presiding Judge of the Court of Sessions of the County of \_\_\_\_\_:

A. B., district attorney of the county of \_\_\_\_\_, respectfully represents, that since the commencement of the present term of this court, certain indictments found in this court at the last term thereof, and transferred to the District Court of the judicial district, against divers persons, charging them with the crime of murder, have been set aside by said court for insufficiency, and the cases have been ordered to be resubmitted to a grand jury of this county;

That it is important that the cases should be speedily investigated, as parties are now in the county jail of said county, under a commitment for said offences, and that there are other persons now confined in said jail upon charges of felony, whose cases require the immediate investigation of a grand jury.

Wherefore your petitioner prays that a grand jury may be forthwith ordered to be summoned before this court for the purpose of transacting such business as may lawfully come before them.

Dated April 19th, 1856.

A. B.,  
District Attorney.

State of California, }  
County of                } ss.

A. B., district attorney of said county, being duly sworn, saith, that the facts stated in the foregoing petition are true.

Sworn and subscribed before me this } A. B.  
19th day of April A. D. 1856. }

M. N., County Clerk.

*Order for Trial Jurors for San Francisco County.*

In the District Court of the Twelfth Judicial District of the State of California, in and for the City and County of San Francisco.

Present, Hon. Edward Norton, judge.

Wednesday, June 1st, A. D. 1859.

Ordered, That forty-eight (48) jurors be drawn and summoned according to law, to serve as trial jurors of this court for the July term, A. D. 1859 next ensuing, and that they be and appear at the court-room of this court in the city-hall of the city and county of San Francisco, on Tuesday, the 5th day of July, A. D. 1859, at ten o'clock A. M. of that day.

And it is further ordered, that William H. Tillinghast and Etting Mickle, citizens of said city and county, be and they are hereby appointed as witnesses to be present at the drawing of said jurors.

I hereby certify the foregoing to be a true copy of the order for trial jurors for the July term, A. D. 1859, as entered in the minutes.

[L. s.] Attest my hand and the seal of said District Court, this  
1st day of June, 1859.

WM. DUER, Clerk,

By W. BARTLETT, Deputy Clerk.

*Clerk's Certificate of Proceedings under foregoing Order.*

State of California, }  
City and County of San Francisco, } ss:

I, William Duer, county clerk of the city and county of San Francisco, do hereby certify, that in pursuance of section V, of an act entitled "An Act to prescribe the Mode of drawing Grand Jurors and Trial Jurors, in the City and County of San Francisco," approved, April 2d, A. D. 1857, and in pursuance of an order of the District Court of the twelfth judicial district of the state of California, in and for the city and county of San Francisco, a copy of which is hereunto annexed, I did on the 2d day of June, A. D. 1859, request the attendance of Charles Doane, sheriff of the city and county of San Francisco, at my office, in

the city-hall of said city and county of San Francisco, on said 2d day of June, 1859, at two o'clock, P. M., and was on said day then and there attended by Robert B. Wallace, a deputy sheriff, of said city and county, and William H. Tillinghast and Etting Mickle, the witnesses named in said order, and in the presence of said Robert B. Wallace, deputy sheriff aforesaid, and the said William H. Tillinghast and Etting Mickle, witnesses, I then and there proceeded to draw by lot in the manner prescribed by law, the names of forty-eight persons, to serve as trial jurors during the July term, A. D. 1859, of said court, a list whereof is hereunto annexed. And I do further certify, that I delivered a list of the names of the persons so drawn, with their residences, to said sheriff, and returned a copy thereof to the said District Court.

Attest my hand this 2d day of June, A. D. 1859.

WILLIAM DUER, County Clerk.

LIST OF NAMES DRAWN.

Name.	Residence.
1. John Brown,	45 William street.
2. John Smith,	103 Third street.
3. Richard Roe,	&c., &c.
&c., &c.	

*Order for Grand Jury, made before Term, for same County.*

Court of Sessions of the  
City and County of San Francisco, } ss:

It appearing necessary to me, M. C. Blake, presiding judge of the Court of Sessions of said city and county, that a grand jury should be summoned for the June term of said court, in the year of our Lord 1858, being the next term thereof, I do therefore hereby order the sheriff of said city and county to summon such grand jury according to law, and that the same may be done, I do further order the county clerk of said city and county, to draw by lot, as by law required, the names of twenty-four persons qualified by law to serve as grand jurors, and to deliver a proper list of the persons so drawn, to the said sheriff, and I also name and appoint Milo Calkin and Charles R. Bond to be present as witnesses at such drawing; and I also order that the persons summoned as grand jurors by virtue of this order, be in attendance on said court at the court-room thereof, in the city-hall in the said city and county, on Monday the 14th day of June, A. D. 1858, at the hour of two of the clock in the afternoon of that day.

Dated this fifth day of June, A. D. 1858. M. C. BLAKE,  
Presiding Judge of the Court of Sessions.



*Sheriff's Return, as to Service of Notice upon Jurors, drawn in obedience to the foregoing Order.*

Office of the Sheriff of the City }  
and County of San Francisco. }

I hereby certify that I received the annexed order of the presiding judge of the Court of Sessions of the city and county of San Francisco, on the 7th day of June, 1858, and that I delivered said order on the same day, to the county clerk of said city and county of San Francisco, and that on the 9th day of June, 1858, William Duer, said county clerk, returned said order to me, with a list of twenty-four names thereunto annexed, together with his certificate that the names mentioned in said list were drawn in accordance with said order, and as prescribed by law; and I further certify, that I personally summoned the following named persons mentioned in said list, which is hereunto annexed, to appear and serve as grand jurors in accordance with said order, to wit: A., B., C., D., E., F., &c., and that I summoned the following named persons, mentioned in said list, to appear and serve as grand jurors in accordance with said order, by leaving a written notice at their places of business, not being able, after due search and inquiry, to find them or their residences, to wit: G., H., I., J., K., L., &c., &c., and that the following named persons, mentioned in said list, to wit: M., N., O., P., Q., R., &c., &c., cannot be found, after due search and inquiry in said city and county, and are not summoned.

CHARLES DOANE, Sheriff.

By D. W. C. THOMPSON, Deputy Sheriff.

San Francisco, June 14th, 1858.

*Order for Additional Grand Jurors—same County.*

State of California, }  
City and County of San Francisco. }

At a Court of Sessions of said city and county, held at the city-hall, in the city and county aforesaid, on the 14th day of June, A. D. 1858.

Present: Hon. M. C. BLAKE, County Judge.

S. A. HASTINGS, and } Associates.  
S. P. BURNHAM, }

Whereas, of the persons summoned to act as grand jurors for the present June term, of the Court of Sessions of the city and county of San Francisco, in accordance with the order of the presiding judge thereof, and required to be in attendance on said court on this day, only thirteen attending as so required, and of those so attending four being duly excused from serving, and it appearing to the court that a grand jury is now required, and that the number of jurors requisite to complete such grand jury

for the present term of this court, cannot be readily obtained under the provisions of an act, &c., &c. [*as in above form*], the sheriff of said city and county is hereby ordered to summon from the body of the county, but not from the bystanders, fifteen duly qualified persons to complete such grand jury, and to require them to be in attendance, &c., &c.

*Same County—Order for Summoning Grand Jury, made before Term.*

In the Court of Sessions of the City and County of San Francisco, on the 20th day of April, A. D. 1859, and after the commencement of the session of said court for the term which began on the fourth day of April, A. D. 1859.

It not having appeared necessary to the presiding judge of said court, before the commencement of the session thereof, for the term aforesaid, that a grand jury should be summoned, and no petition of any kind, asking that a grand jury should be summoned, having been presented to said judge, and no grand jury having been summoned for the said term of said court: and now, it appearing proper to the said judge, that a grand jury should be summoned for the term of said court before named, I, the said judge, do hereby order that a grand jury shall be summoned for this court for the present term thereof, to be in attendance thereon on Saturday, the 23d day of April, instant, at two of the clock, P. M., and the sheriff of said city and county is hereby directed to execute this order, in manner as by law required.

I am of the opinion, that the jury hereby ordered to be summoned, cannot be readily obtained under the provisions of an act entitled "An Act to prescribe the Mode of drawing Grand Jurors and Trial Jurors in the City and County of San Francisco," approved April 2d, 1857.

I direct that this order be entered upon the minutes of the said court, and a copy thereof be delivered to the said sheriff.

M. C. BLAKE,

Presiding Judge of the Court of Sessions of the City and County of San Francisco.

*Same County—Order to Summon Trial Jury after Commencement of the Term—with Return of Officer.*

In the Court of Sessions of the City and County of San Francisco.

Now on this eleventh day of April, A. D. 1859, during the term of said court, which commenced on the fourth day of April, A. D. 1859, a jury becoming and being necessary in said court, for and during the term aforesaid, and no jury having been in any man-

ner, or for any cause ordered therefor, and the court being of the opinion that the jury so required cannot be readily obtained under the provisions of an act entitled "An Act to prescribe the Mode of drawing Grand Jurors and Trial Jurors in the City and County of San Francisco"—approved April 2, A. D. 1857, the sheriff of said city and county is hereby ordered by the court to summon from the citizens of the county, but not from the bystanders, forty-eight persons to form a trial jury for said court, on Wednesday next, the thirteenth day of April instant, at ten o'clock A. M. on that day.

*Juror's Summons.*

**Sheriff's Office, San Francisco, April 1, 1859.**

To Mr. James Don: You are hereby commanded to be and appear before the Court of Sessions of the city and county of San Francisco, on Tuesday, the fifth day of April, 1859, at ten o'clock, A. M., at the court-room of said court, at the City Hall in the city and county of San Francisco, then and there to serve as a trial juror [*or, grand juror.*]

Herein fail not, under the penalty of the law.

CHARLES DOANE, Sheriff.

By D. W. C. THOMPSON, Deputy Sheriff.

*Order for Special Jury in an Insolvency Case.*

**District Court, Fourth Judicial District, City and County of San Francisco.**

Edward Smith, an Insolvent Debtor, }  
*against*  
 his Creditors. }

Ordered that six (6) jurors be drawn and summoned according to law, to serve as special jurors in this cause, and try the issues of fraud joined herein, and that they be and appear at the courtroom of this court in &c., on &c. It is further ordered, that Milo Calkin and Charles R. Bond, citizens of said city and county, be and they are hereby appointed as witnesses, to be present at the drawing of said jurors.

I hereby certify the foregoing to be a true and correct copy of the order entered on the minutes of said fourth district court, in the above-entitled cause.

Attest my hand and the seal of said district court, this  
[L. s.] twenty-first day of September, A. D. 1858.

WILLIAM DUEB, Clerk.

By CHAS. S. CAPP, Deputy Clerk.

*Return of Officer on the Foregoing.*

Office of the Sheriff of the  
City and County of San Francisco, } ss:

By virtue of and in accordance with the annexed order made by the Court of Sessions of the city and county of San Francisco, on the eleventh day of April, 1859, and received by me on the same day, I have personally summoned from the citizens of the county, but not from the bystanders, the following-named persons, to wit: A. B., C. D., E. F., &c., by giving written notice to each of them personally in said city and county, to be in attendance on said court, on Wednesday, the thirteenth day of April, 1859, at ten o'clock A. M. of that day, to form a trial jury for said court during the present term thereof.

CHARLES DOANE, Sheriff.

By D. W. C. THOMPSON, Deputy Sheriff.

San Francisco, April 13, 1859.



## CHAPTER XXV.

## JUSTICES' COURTS.

JUSTICES of the Peace, beside entertaining jurisdiction in certain civil and criminal actions, have authority in a variety of other matters, under the provisions of different statutes.

A portion of their statutory duties are enumerated in the succeeding section, and their authority as committing magistrates will be found in the chapter entitled *MAGISTRATE*. They are authorized to take acknowledgments of the execution of deeds, and other instruments affecting property in the county of their jurisdiction,<sup>1</sup> to administer oaths and affirmations,<sup>2</sup> to require hawkers and peddlers to take out license,<sup>3</sup> to apprehend vagrants and dissolute persons,<sup>4</sup> to regulate the apprenticing and treatment of Indians,<sup>5</sup> to direct the disposition of estrays,<sup>6</sup> to review the decisions of judges of the plains,<sup>7</sup> to take cognizance of violations of the game laws,<sup>8</sup> and of the law forbidding barbarous and noisy amusements on the Sabbath,<sup>9</sup> to require sureties of the peace from keepers of brothels and to punish for obscene publications,<sup>10</sup> to aid the sheriff in securing wrecks and lost property,<sup>11</sup> to remove dams, or other obstructions to the run of salmon, and to take cognizance of offences against the law for the preservation of salmon,<sup>12</sup> to consent to the apprenticing of minors in certain cases,<sup>13</sup> to administer oaths of office,<sup>14</sup> to receive fees to their own use,<sup>15</sup> and to officiate as associate judges of the court of sessions.<sup>16</sup>

By the constitution, judicial power is vested in justices of the peace, and they are authorized to hold courts in the respective

<sup>1</sup> See *ACKNOWLEDGMENT*.

<sup>2</sup> Wood's Dig. art. 443, 107.

<sup>3</sup> *Id.* 9057.

<sup>4</sup> *Id.* 8452.

<sup>5</sup> *Id.* 2643, 2649, and 2653.

<sup>6</sup> *Id.* 2387; Laws 1859, p. 147.

<sup>7</sup> Wood's Dig. art. 2095.

<sup>8</sup> *Id.* 2540.

<sup>9</sup> *Id.* 3179.

<sup>10</sup> *Id.* 2593; Laws 1859, p. 297.

<sup>11</sup> Wood's Dig. art. 3530.

<sup>12</sup> *Id.* 3195.

<sup>13</sup> Laws 1858, p. 134.

<sup>14</sup> Wood's Dig. art. 2869.

<sup>15</sup> Const. art. vi. sec. 11.

<sup>16</sup> *Id.* sec. 8.

townships for which they are elected, which are denominated justices' courts.<sup>1</sup>

The civil and criminal jurisdiction of justices' courts is defined by statute as follows:<sup>2</sup>

Justices' courts shall have jurisdiction of the following actions and proceedings: 1. Of an action arising on contracts for the recovery of money only, if the sum claimed, exclusive of interest, does not exceed two hundred dollars. 2. Of an action for damages for injury to the person, or for taking or detaining personal property, if the damages claimed do not exceed two hundred dollars. 3. Of an action for a fine, penalty or forfeiture, not exceeding two hundred dollars, given by statute or the ordinance of an incorporated city. 4. Of an action upon a bond conditioned for the payment of money not exceeding two hundred dollars, though the penalty exceed that sum, the judgment to be given for the sum actually due; when the payments are to be made by instalments, an action may be brought for each instalment as it becomes due. 5. Of an action upon a surety bond or undertaking taken by them, though the penalty exceed, if the amount claimed does not exceed two hundred dollars. 6. Of an action for the foreclosure of any mortgage, or the enforcement of any lien on real or personal property, when the debt secured does not exceed, exclusive of interest, two hundred dollars. 7. Of an action to recover the possession of personal property, when the value of such property does not exceed two hundred dollars. 8. To take and enter judgment on the confession of a defendant, when the amount confessed does not exceed two hundred dollars. 9. Of an action for a forcible or unlawful entry upon, or a forcible or unlawful detention of lands, tenements, or other possession. 10. Of an action to determine the right to a mining claim, and for damages for injury to the same, when the damages claimed do not exceed two hundred dollars. 11. Of proceedings respecting vagrants and disorderly persons.

The jurisdiction conferred by the last section shall not extend, however: 1. To a civil action in which the title to real property shall come in question. 2. Nor to an action or proceeding against ships, vessels or boats, or against the owners or masters

<sup>1</sup> Const. art. vi. sec. 1 and 4.

<sup>2</sup> Wood's Dig. art. 678-680; and see *MAGISTRATE*.

thereof, when the suit or proceeding is for the recovery of seamen's wages for a voyage performed in whole or in part without the waters of this state.

These courts shall also have jurisdiction, except within the limits of the city of San Francisco, of the following public offences committed within the respective counties in which such courts are established: 1. Petit larceny. 2. Assault and battery, not charged to have been committed upon a public officer in the discharge of his duties, or with intent to kill. 3. Breaches of the peace, riots, affrays, committing a wilful injury to property; and all misdemeanors, punishable by fine, not exceeding five hundred dollars, or imprisonment not exceeding six months, or by both such fine and imprisonment. See chapter entitled **MAGISTRATE**.

There shall be no terms in justices' courts; these courts shall always be open.

In the city and county of San Francisco, under the provisions of the Consolidation Act as amended April 18, 1857, the criminal jurisdiction of justices of the peace is invested in the police judge.

A justice is required to keep a record or statement of every proceeding taken before him, with all the particulars, in a book, with an alphabetical index, which is called his docket. This docket is transmitted to his successor, together with any docket or dockets of his predecessors which may be in his custody, to be kept as public records. Should his office become vacant by death or otherwise, these records are deposited with the county clerk until there be a successor.<sup>1</sup>

In this docket must be entered all the steps which occur in an action or proceeding, from the title of the suit to the notice of appeal, and the entry of each matter must be made at the time it occurs. Such entries, or a certified transcript thereof, are primary evidence of the facts so stated.<sup>2</sup>

From such docket, execution or other process may be issued by the justice, or his successor in office; a certified transcript of a judgment entered therein, may be recorded in the office of the county recorder of any county, and thereupon constitute a lien upon real estate. Or the same may be filed in the office of the

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<sup>1</sup> Practice Act, § 604-607.

<sup>2</sup> *Id.* 605.

clerk of the county in which such justice has jurisdiction, upon which the judgment may be docketed by the county clerk, and execution may be issued to any other county of the state.<sup>1</sup>

A justice has power to punish for contempt, summarily, when committed in his presence, and upon a warrant of arrest when not committed in his immediate view. Such punishment cannot exceed, however, in any case, a fine of one hundred dollars, and imprisonment for one day.<sup>2</sup>

A justice may in all cases require a deposit of money, or an undertaking, as security for costs of court, before issuing a summons. He must receive all moneys collected by any sheriff or constable on process from his court, and pay the same over to the parties entitled, without delay, on penalty of removal from office and conviction of misdemeanor.<sup>3</sup> Except in certain cases, a civil action in a justice's court, should be brought in the township where the defendant resides. In San Francisco, the defendant may be sued in any township of the county. A non-resident of the county may be sued whenever found. Parties may appear voluntarily and enter an action, or judgment by confession may be entered before any justice.<sup>4</sup>

By the law of California, actions are required to be prosecuted in the name of the real party in interest.<sup>5</sup>

When a married woman is a party her husband must join with her, except when the action concerns her separate property. An infant can only appear by a guardian *ad litem*, who is appointed by the justice.<sup>6</sup>

The mode of commencing a civil action is by filing a copy of the account, note, bill of exchange or evidence of indebtedness, bond or instrument, sued on, or a concise statement in writing of the cause of action, and the issuance of a summons thereon.<sup>7</sup>

The summons may be accompanied, according to the nature of the action, by an order of arrest (if the defendant be not a female), a writ of attachment, or an order for the delivery of personal property. For each of these additional processes, special application must be made under the statute, and security given.<sup>8</sup>

<sup>1</sup> Practice Act, § 606 and 509.

<sup>2</sup> Id. 616-618.

<sup>3</sup> Id. 603, 634.

<sup>4</sup> Id. 535-537.

<sup>5</sup> Id. 4 and 533.

<sup>6</sup> Id. 7, 8, and 503.

<sup>7</sup> Id. 583.

<sup>8</sup> Id. 544-550.



The summons shall be addressed to the defendant by name, or if his name be unknown, by a fictitious name; and shall summon him to appear before the justice, at his office, naming its township or city, and, at a time specified therein, to answer the complaint of the plaintiff, for a cause of action therein described in general terms, sufficient to apprise the defendant of the nature of the claim against him; and in action for money or damages, shall state the amount for which the plaintiff will take judgment, if the defendant fail to appear and answer. It shall be subscribed by the justice before whom it is returnable.<sup>1</sup>

The summons, when accompanied with an order of arrest, is returnable immediately. When either party is a non-resident of the township or city, it is returnable, not more than two days from date, and must be served at least one day beforehand. In all other cases, not less than two nor more than ten days from date, and must be served at least two days before the time for appearance.<sup>2</sup>

It must be served by the sheriff, or a constable of the county, by delivering a copy personally to the defendant, or his, or its, legal representative. If he is a non-resident, or cannot be found, or secretes himself, service may be made by publication of the summons.<sup>3</sup>

The legal statements by the parties, of the cause of action and the grounds of defence, are called pleadings, and are,

1st. The complaint by the plaintiff.

2d. The answer by the defendant.<sup>4</sup>

When the pleadings are oral, the justice must enter the substance of them in his docket. When they are in writing, he must file them in his office, and make a reference to them in the docket. They are not required to be in any particular form, but should be plain, direct statements, such as to enable a person of common understanding to know what is intended.<sup>5</sup>

The pleadings shall be in writing, and verified by the oath of the party, his agent or attorney, when the action is: 1. For the foreclosure of any mortgage or the enforcement of any lien on personal property. 2. For a forcible or unlawful entry upon, or a forcible or unlawful detention of lands, tenements, or other pos-

<sup>1</sup> Practice Act, § 540.

<sup>2</sup> Id. 541.

<sup>3</sup> Id. 542, 543.

<sup>4</sup> Id. 570.

<sup>5</sup> Id. 572.

sessions. 3. To recover possession of a mining claim. In other cases the pleadings may be oral or in writing.<sup>1</sup>

In addition to his denial of the complaint, or other ground of defence, the defendant may set up a counter-claim.<sup>2</sup>

When the cause of action or counter-claim, is an account or instrument for the payment of money only, no formal pleading is necessary; the party may simply deliver a copy of the account or instrument to the court, stating the specified sum he claims to recover or set-off. The original must be produced and a copy furnished to the adverse party, if required.<sup>3</sup>

Where a copy of the note, bill of exchange, or other written obligation for the payment of money sued on, is filed, the signatures of the makers, endorsers or assignors thereof, are admitted unless the defendant specifically deny them in his answer, under oath.<sup>4</sup>

Either party may object to a pleading of his adversary, or to any part thereof, that it is not sufficiently explicit to enable him to understand it, or that it contains no cause of action or defence, although it be taken as true. If the court deem the objection well founded, it shall order the pleading to be amended, and if the party refuse to amend, the defective pleading shall be disregarded.<sup>5</sup>

A variance between the proof on the trial and the allegations in a pleading, shall be disregarded as immaterial, unless the court be satisfied that the adverse party has been misled to his prejudice thereby.<sup>6</sup>

The pleadings may be amended at any time before the trial, to supply a deficiency or omission, when by such amendment substantial justice will be promoted. If the amendment be made after the issue, and it be made to appear to the satisfaction of the court, by oath, that an adjournment is necessary to the adverse party in consequence of such amendment, an adjournment shall be granted. The court may, also, in its discretion, require as a condition of an amendment, the payment of costs to the adverse party, to be fixed by the court, not exceeding twenty dollars; but such payment shall not be required unless an adjournment is made necessary by the amendment; nor shall an amendment be allowed, after a witness is sworn on the trial, when an adjournment will thereby be made necessary.<sup>7</sup>

<sup>1</sup> Practice Act, § 571.

<sup>2</sup> *Id.* 574, 575.

<sup>3</sup> *Id.* 576.

<sup>4</sup> *Id.* 577.

<sup>5</sup> *Id.* 578-580.

When upon the trial of a cause, it shall appear from the showing of the plaintiff, or from the sworn answer of the defendant, that the determination of the action will necessarily involve the decision of a question of title to real property, the justice, not having jurisdiction of such questions, must suspend all further proceedings in the case, and certify it up to the District Court. Simply swearing to the fact, will not constitute sufficient ground for the justice to send up the case; but the facts and circumstances must appear on the trial, or must be set forth in the sworn answers, showing, legally and logically, that a necessity exists for raising the question of title to real property. If the transfer is made on the application of the defendant, he must give security for costs.<sup>3</sup>

When the justice is a material witness for either party, or when either party makes affidavit, that he cannot have a fair and impartial trial, by reason of the interest, prejudice and bias of the justice, or where a jury trial is demanded, by reason of the bias, &c., of the citizens of the township, the action may be transferred to another justice.<sup>4</sup>

On the return day of the summons, the case may be adjourned upon a proper showing being made, not to exceed ten days, except where a long adjournment be necessary, in order to obtain material evidence, in which case the adjournment may be made for a period not to exceed four months, the party being required to give security to pay any judgment that may be obtained against him.<sup>5</sup>

If the plaintiff fail to appear at the return day of the summons, the action shall be dismissed. If the defendant fail to appear at the return day of the summons, or if either party fail to attend at a day to which the trial has been adjourned, or fail to make the necessary pleading or proof on his part, the case may, nevertheless, proceed, at the request of the adverse party, and judgment shall be given in conformity with the pleadings and proofs.<sup>6</sup>

When the defendant fails to appear and answer, judgment shall be given for the plaintiff, as follows: 1. When a copy of the account, note, bill, or other obligation upon which the action is

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<sup>3</sup> Practice Act, § 561.

<sup>4</sup> *Id.* 562.

<sup>5</sup> *Id.* 563-565.

<sup>6</sup> *Id.* 566.

brought, was filed with the justice at the time the summons was issued, judgment shall be given without further evidence, for the sum specified in the summons. 2. In other cases the justice shall hear the evidence of the plaintiff, and render judgment for such sum only as shall appear by the evidence to be just; but in no case exceeding the amount specified in the summons.<sup>1</sup>

Judgment that the action be dismissed without prejudice to a new action, may be entered, with costs, in the following cases: 1. When the plaintiff voluntarily dismisses the action before it is finally submitted. 2. When he fails to appear at the time specified in the summons, or upon adjournment, or within one hour thereafter. 3. When it is objected at the trial, and appears by the evidence, that the action is brought in the wrong county, or township, or city; but if the objection be taken and overruled, it shall be cause only of reversal on appeal, and shall not otherwise invalidate the judgment; if not taken at the trial, it shall be deemed waived, and shall not be cause of reversal.<sup>2</sup>

Upon issue joined, if a jury trial be not demanded, the justice shall hear the evidence, and decide all questions of fact and of law, and render judgment accordingly.<sup>3</sup>

In actions respecting mining claims, proof shall be admitted of the customs, usages or regulations established and in force at the bar or diggings embracing such claim; and such customs, usages or regulations, when not in conflict with the constitution and laws of this state, shall govern the decision of the action.<sup>4</sup>

A trial by jury shall be demanded at the time of joining issue; and shall be deemed waived, if neither party then demand it. When demanded, the trial of the case shall be adjourned, until a time and place fixed for the return of the jury. If neither party desire an adjournment, the time and place shall be determined by the justice, and shall be on the same day, or within the next two days. The jury shall be summoned upon an order of the justice from the citizens of the city or township, and not from the bystanders.<sup>5</sup>

At the time appointed for the trial, the justice shall proceed to call, from the jurors summoned, the names of the persons to con-

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<sup>1</sup> Practice Act, § 592.

<sup>2</sup> *Id.* 591.

<sup>3</sup> *Id.* 593.

<sup>4</sup> *Id.* 621.

<sup>5</sup> *Id.* 587-590.

stitute the jury for the trial of the issue. The jury, by consent of the parties, may consist of any number not more than twelve, nor less than three.<sup>1</sup>

If a sufficient number of competent and indifferent jurors do not attend, the justice shall direct others to be summoned from the vicinity, and not from the bystanders, sufficient to complete the jury.<sup>1</sup>

Either party may challenge the jurors. The challenges shall be either peremptory or for cause. Each party shall be entitled to three peremptory challenges. Either party may challenge for cause, on any grounds set forth in section one hundred and sixty-two. Challenges for cause shall be tried by the justice in a summary manner, who may examine the jury challenged, and witnesses.<sup>1</sup>

Upon a verdict the justice shall immediately render judgment accordingly. When the trial is by the justice, judgment shall be entered immediately after the close of the trial, if the defendant has been arrested, and is still in custody; in other cases it shall be entered within four days after the close of the trial. If the action be on contract against two or more defendants, and the summons is served on one or more, but not on all, the judgment shall be entered up only against those who were served, if the contract be a several or a joint and several contract; but if the contract be a joint contract only, the judgment shall be entered up against all the defendants, but shall only be enforced against the joint property of all, and the separate property of the defendants served.<sup>2</sup>

When the amount found due to either party exceeds the sum for which the justice is authorized to enter judgment, such party may remit the excess, and judgment may be rendered for the residue.<sup>2</sup>

When a judgment is rendered in a case where the defendant is subject to arrest and imprisonment thereon, it shall be so stated in the judgment, and entered in the docket.<sup>2</sup>

When the prevailing party is entitled to costs by this chapter, the justice shall add their amount to the verdict: or, in case of a failure of the plaintiff to recover, or in case of a dismissal of the

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<sup>1</sup> Practice Act, § 587-590.

<sup>2</sup> *Id.* 597, 598.

<sup>3</sup> *Id.* 594, 595.

action, shall enter up judgment in favor of the defendant for the amount of such costs.<sup>1</sup>

If the defendant, at any time before the trial, offer, in writing, to allow judgment to be taken against him for a specified sum, the plaintiff may immediately have judgment therefor, with the costs then accrued; but if he do not accept such offer before the trial, and fail to recover in the action a sum equal to the offer, he shall not recover costs, but costs shall be adjudged against him, and if he recover, deducted from his recovery. But the offer and failure to accept it shall not be given in evidence to affect the recovery otherwise than as to costs, as above provided.<sup>2</sup>

Justices of the peace may issue subpoenas in any action or proceeding in the courts held by them, and final process on any judgment recovered therein, to any part of the county.<sup>3</sup>

Execution for the enforcement of a judgment in a justice's court may be issued on the application of the party entitled thereto, at any time within five years from the entry of judgment.<sup>4</sup>

The execution, when issued by a justice, shall be directed to the sheriff, or to a constable of the county, and subscribed by the justice by whom the judgment was rendered, or by his successor in office, and shall bear date the day of its delivery to the officer to be executed. It shall intelligibly refer to the judgment, by stating the names of the parties, and the name of the justice before whom, and of the county, and the township or city, where, and the time when, it was rendered; the amount of judgment, if it be for money; and if less than the whole is due, the true amount due thereon. It shall contain, in like cases, similar directions to the sheriff or constable as are required by the provisions of title seven<sup>4</sup> of this act, in an execution to the sheriff.<sup>5</sup>

The sheriff or constable to whom the execution is directed shall proceed to execute the same in the same manner as the sheriff is required by the provisions of title seven<sup>4</sup> of this act to proceed upon executions directed to him; and the constable, when the execution is directed to him, shall be vested for that

<sup>1</sup> Practice Act, §§ 597, 598.

<sup>2</sup> Id. 596.

<sup>3</sup> Id. 619 and 600-602.

<sup>4</sup> Id. 209-245; Laws 1859, pp. 132, 140.

purpose with all the powers of the sheriff, and, after issuing an execution, and either before or after its return (if the same be returned unsatisfied either in whole or in part), the judgment creditor shall be entitled to an order from the justice requiring the judgment debtor to attend, at a time to be designated in the order, and answer concerning his property before such justice, and the attendance of such debtor may be enforced by the justice; on his attendance such debtor may be examined under oath concerning his property, and any person alleged to have in his hands property, moneys, effects or credits of the judgment debtor may also be required to attend and be examined, and the justice may order any property in the hands of the judgment debtor, or any other person not exempt from execution, belonging to such debtor, to be applied toward the satisfaction of the judgment; and the justice may enforce such order by imprisonment until complied with, but no judgment debtor or other person shall be required to attend before the justice out of the county in which he resides.<sup>1</sup>

The summons, execution and every other paper made or issued by a justice, except a subpoena, shall be filled up without a blank left to be filled by another, otherwise it shall be void.<sup>2</sup>

In case of sickness or other disability of the justice, another justice of the township or city may act in his stead.<sup>3</sup>

A discreet person may be deputed to serve process, in place of the constable, assuming his authority and obligations.<sup>4</sup>

A constable, notwithstanding the expiration of his term of office, may proceed and complete the execution of all final process which he has begun to execute, in the same manner as if he still continued in office, and his sureties shall be liable to the same extent.<sup>5</sup>

Commissions to take depositions of witnesses out of the state may be issued by justices, and the provisions of the statute concerning witnesses, and the manner of obtaining evidence in district courts are made applicable to justice's courts, so far as consistent with the jurisdiction and powers of justice's courts.<sup>6</sup>

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<sup>1</sup> Practice Act, § 619 and 600-602.

<sup>2</sup> Practice Act, § 611.

<sup>3</sup> Id. 612.

<sup>4</sup> Id. 612, 614; 4 Cal. 122.

<sup>5</sup> Practice Act, § 615.

<sup>6</sup> Id. 620, 591-454.

Any party dissatisfied with the judgment may appeal to the county court within thirty days, on payment of the court fees; by filing a notice of appeal with the justice, serving a copy on the opposite party, and filing an undertaking for costs in the sum of one hundred dollars. If he wishes to stay execution, the bond must be in twice the amount or value of the judgment and costs; and in every case the sureties must justify. In place of giving the bond, a deposit of money may be made.<sup>1</sup>

The appeal may be taken from the whole, or part of the judgment; and on questions of law, or fact, or both; and the notice should specify the character and extent of the appeal. A notice of appeal "from the whole judgment," is considered a sufficient notice of appeal, on questions of both law and fact.<sup>2</sup>

When the appeal is on questions of law alone, a statement must be prepared within ten days, of the grounds of appeal, and so much of the evidence as is applicable; and if amendments be filed, the whole must be settled by the justice on notice. The statement must be made, even though the errors of law are apparent in the papers, and the same with a copy of the docket, all motions filed, the notice of appeal and the undertaking filed, must be sent up to the county court.<sup>3</sup>

When a party appeals to the county court on questions of fact, or on questions of both law and fact, no statement need be made, but the action shall be tried anew in the county court.<sup>4</sup>

It is the duty of the justice, within five days after the appeal is perfected, on payment of his fees, to send up all the papers to the county court, and he may be compelled to transmit them, by an order entered, on motion, by the county court, and may be fined for a neglect or refusal.<sup>5</sup> There is some question as to whether, when the appeal is perfected immediately after judgment, the appellant has the whole period of the thirty days in which to pay the justice's costs and have the papers sent up. The county court of San Francisco has made a rule, that except in cases of error, mistake or oversight, the appeal may be dismissed on motion for—

1st. The failure of the appellant to pay or tender to the justice

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<sup>1</sup> Practice Act, §§ 694, 693.

<sup>2</sup> *Id.* 694.

<sup>3</sup> *Id.* 695.

<sup>4</sup> *Id.* 696.

<sup>5</sup> *Id.* 697.



his costs on appeal, and to pay or tender, either to the justice or clerk of this court, the fees of the county clerk for entering the cause in the county court, within such time after taking the appeal as will permit the cause to be entered on the general calendar of this court for the term next succeeding the taking the appeal, allowing to the justice five days after the taking the appeal, and before the commencement of the next term, in which to transmit the papers.

2d. The failure of the appellant to use due diligence to procure the transmission of the papers to the county court, and to cause the case to be entered on the trial calendar, or other negligence in prosecuting the appeal.

#### FORCIBLE ENTRY AND UNLAWFUL DETAINER.

Forcible entry and unlawful detainer are the violent and unlawful taking and keeping possession of lands, tenements, and other possessions, with threats, force and arms.

The statute of California<sup>1</sup> declares :

"No person or persons shall hereafter make an entry into lands, tenements, or other possessions, but in cases where entry is given by law, and in such cases, not with strong hand, nor with multitude of people, but only in a peaceable manner; and if any person from henceforth do to the contrary, and thereof be duly convicted, he shall be punished by fine."

This action may be maintained in three cases; first, when the entry is forcible; second, when the entry is simply unlawful and the detainer forcible; third, when the entry was lawful, and the detainer or holding over forcible. But in all these cases there must be something of personal violence, either threatened or actual.<sup>2</sup> The complainant must show an actual, peaceable, and exclusive possession of the property in himself at the time of the entry; therefore it is that a landlord cannot maintain this action for an unlawful entry upon his tenant. The design of the statute is simply the protection of the possession, and it cannot be extended by implication to any other than the real occupant.<sup>3</sup>

The action cannot be maintained where the defendant, or his ancestors, or those whose interest in the premises he claims, have

<sup>1</sup> Wood's Dig. p. 467.

<sup>2</sup> 5 Id. 112.

<sup>3</sup> 9 Cal. R. 46.

been in the quiet possession for the space of a year, next before the institution of the suit. Jurisdiction is given in all these cases to justices of the peace, without reference to the value of the premises, or the amount of damages claimed.<sup>1</sup>

#### OREGON AND WASHINGTON.

In *Oregon* and *Washington* the civil jurisdiction is substantially the same, except that,

1. The jurisdiction is limited in amount to the sum of one hundred dollars.

2. Actions to foreclose mortgages and enforce liens on real estate, actions for false imprisonment, libel, slander, malicious prosecution, criminal conversation, or seduction (and in *Oregon* on promises to marry,) and actions against an administrator or executor, as such, cannot be maintained.

3. The action for seamen's wages is not restricted.

He has also jurisdiction in actions for fraud, in the sale, purchase, or exchange of personal property to one hundred dollars.

The criminal jurisdiction of justices in *Oregon* is limited principally to actions for

1. Breaches of the peace, assaults, batteries, and affrays, not being cases of riot, unlawful assembly, or with intent to murder, kill, maim, rob, or rape.

2. Fines and forfeitures under the Gambling Act.

3. Disturbing religious meetings.

4. Injuring trees or fences, breaking glass, destroying or altering monuments, guide-boards, or certain other property; trespassing upon lands with intent to commit injury to the same.

5. Larceny under twenty dollars.

6. Buying, receiving, or aiding in the concealment of goods or property under twenty dollars.

The criminal jurisdiction of justices in *Washington Territory* is concurrent with that of the district court in affrays, assaults, assaults and batteries, violation of estray laws, obstructing of highways and bridges, neglect of roads by supervisors, public indecency, having obscene books and pamphlets for publication or otherwise; forcible entry and detainer, malicious trespass, where the fine does

not exceed thirty dollars; they also have cognizance of cases of breaches of the peace, and are authorized to suppress riots.

#### JUDICIAL DECISIONS.

Where a judgment of a justice of the peace is for an amount exceeding his jurisdiction, the county court, on appeal, should dismiss the whole case.<sup>1</sup>

Justices of the peace have no jurisdiction to try a cause where there is an alleged injury arising out of a diversion of water from the natural or artificial channel in which it is conducted.<sup>2</sup>

Justices of the peace have no jurisdiction in actions to recover damages for injury to a mining claim, or for its detention.<sup>3</sup>

Where the complaint in an action to recover possession of a mining claim in a justice's court contains an allegation of injury done, and a prayer for damages, the latter should be disregarded or stricken out, and the plaintiff be allowed to try his right to the claim.<sup>4</sup>

The legislature cannot confer any jurisdiction upon justices of the peace over cases where the amount in dispute exceeds in value the sum of two hundred dollars, the statute giving them jurisdiction over cases of disputed mining claims, has been already construed by this court by this rule, to which there are no exceptions.<sup>5</sup>

The objection to the jurisdiction, on the ground of excess of value of the subject of controversy, is properly taken by answer, and when so taken, should be first determined before proceeding to hear the merits of the case.<sup>6</sup>

The jurisdiction of justices of the peace in forcible entry and detainer cases arises from the *quasi* criminal nature of those cases, which fall under the head of special cases, as that term is used in the constitution.<sup>7</sup>

The jurisdiction of justices of the peace is limited by the constitution to cases in which the value of the thing in controversy does not exceed the sum of two hundred dollars, except in proceeding under the statute concerning forcible entry and unlawful detainer.<sup>8</sup>

<sup>1</sup> Ford v. Smith, 5 Cal. 881.

<sup>2</sup> Hill v. Newman, et al. 5 Cal. 445.

<sup>3</sup> Van Etten v. Jilson, 6 Cal. 19.

<sup>4</sup> Small v. Gwinn, 6 Cal. 447.

<sup>5</sup> Freeman v. Powers, 7 Cal. 104.

The fact that the thing in dispute, a mining claim, is worth more than two hundred dollars, ousts the justice of his jurisdiction.<sup>1</sup>

Judgment by consent or confession, for over two hundred dollars, in a justice's court, is void. Consent of parties cannot give jurisdiction which the constitution denies.<sup>2</sup>

A notice of appeal from a justice's to a county court, stating that defendant appealed from the whole judgment, is a sufficient notice within the statute.<sup>3</sup>

Notice of appeal from the judgment of a justice of the peace may be served on the attorney of the adverse party.<sup>4</sup>

The general law regulating appeals, which provides that notice may be served on the party or his attorney, must govern cases arising in justices' courts.<sup>5</sup>

A justice of the peace may refuse to send up the transcript of a cause tried before him until his fees are paid by the appellant; but if he sends it up without receiving his fees, the fact that they are not paid is no ground for dismissing the appeal.<sup>6</sup>

Where a party appealed from a justice's court to a county court, and the justice neglected to send up with the record the notice of appeal: *held*, that it was error to refuse to allow appellant the opportunity of moving to compel the justice to send it up, by peremptorily dismissing the appeal.<sup>7</sup>

A defendant who has been properly served with process issued out of a justice's court, who allows judgment to be taken against him by default, admits the facts alleged in the complaint, and no appeal will lie from such judgment in reference to such facts, there being no issue of fact.<sup>8</sup>

In such a case, where the defendant appeals on both questions of law and fact, he is not entitled to a trial *de novo*.<sup>9</sup>

Nor could he ask the county court to hear the appeal, on questions of law, unless there was a statement filed of the grounds on which he intended to rely.<sup>10</sup>

A justice of the peace has jurisdiction to grant appeals, and

<sup>1</sup> *Freeman v. Powers*, 7 Cal. 104.

<sup>2</sup> *Fellett v. Engles*, 8 Cal. 76.

<sup>3</sup> *McDermott v. Douglass*, 5 Cal. 89.

<sup>4</sup> *Welton v. Garibaldi*, 6 Cal. 245.

<sup>5</sup> *Bray v. Redman*, 6 Cal. 287.

<sup>6</sup> *Sherman v. Rolberg*, 9 Cal. 17.

<sup>7</sup> *The people ex rel. Jones v. the county court of El Dorado County*, 10 Cal. 19.

to stay proceedings thereupon, and his action cannot be reviewed on *certiorari*.<sup>1</sup>

An execution can only be issued upon a judgment obtained before a justice of the peace, within five years after the entry of the judgment. In contemplation of the statute, there is no judgment after that time.<sup>2</sup>

The loss of the docket of the justice will not prevent the statute from running.<sup>3</sup>

It is the duty of a justice of the peace, when an appeal bond is presented to him for his approval, to act promptly. If he receives the bond without objection, it will be too late to disapprove it the next day.<sup>4</sup>

An offer to pay the justice his costs, on appeal, so soon as the appeal papers are ready to transmit to the county court, is not a sufficient tender, under the statute. The fees must be tendered unconditionally.<sup>5</sup>

The justice is not bound first to make out the papers, and then rely on his fees being afterward paid.<sup>6</sup>

Where an alternative *mandamus* was issued to a justice of the peace to compel him to send up papers on appeal to the county court, to which he answered that his fees had not been paid or tendered "prior to the service of the alternate writ:" *held*, his answer is no defence to the writ being made peremptory, as the fees may have been paid *since* the service of the writ.<sup>7</sup>

The constitution vests the legislature with power to confer such jurisdiction on justices' courts as are not exclusively vested in other courts. The act conferring criminal jurisdiction on justices' courts is constitutional.<sup>8</sup>

A justice of the peace cannot take and certify the acknowledgment of a married woman. It must be done by a justice of the Supreme Court, judge of a District Court, county judge, or notary public.<sup>9</sup>

Where a cause is heard on appeal in a county court, for the purpose of trying the same *de novo*, it is the duty of the court to proceed with the trial on the merits of the case.<sup>10</sup>

A judgment of dismissal, therefore, upon the ground that it

<sup>1</sup> *Coulter v. Stark*, 7 Cal. 244.

<sup>2</sup> *White v. Clark*, 8 Cal. 512.

<sup>3</sup> *People ex rel. v. Harris*, 9 Cal. 571.

<sup>4</sup> *People v. Fowler*, 9 Cal. 85.

<sup>5</sup> *Kendall v. Miller*, 9 Cal. 501.

<sup>6</sup> *Coyle v. Baldwin et al.*, 5 Cal. 75.

did not appear that the defendants had notice of the trial in the court below, is erroneous, and will be set aside.<sup>1</sup>

An objection that a county court has no jurisdiction in cases on appeal, where no appeal bond is given as required by the statute, should be made in the court below. It is too late to raise the question in the county court.<sup>2</sup>

Where such an objection is made within the proper time, it is the duty of the presiding judge to hear the excuse of the party failing to produce it, and if sufficient, to allow him to file a bond.<sup>3</sup>

Amendments should be readily allowed, whenever they will tend to the furtherance of justice, and the greatest liberality in this respect should be extended to pleadings in justices' courts.<sup>4</sup>

The county court has the sole appellate jurisdiction in all cases, civil and criminal, arising in justices' courts, subject to such restriction as the legislature may impose by making the decisions of the justice final in such cases as may be determined by law.<sup>5</sup>

The Court of Sessions has no appellate jurisdiction in either civil or criminal cases. Their jurisdiction is original, not appellate. In all cases where an appeal lies from a justice's court, it must be taken to the county court.<sup>6</sup>

The failure of a justice of the peace to state in his docket that the summons was returned "served," will not vitiate the judgment on appeal. The fact of service may be shown by the return of the officer on the summons.<sup>7</sup>

An appeal cannot be taken from the decision of the county court to the Supreme Court, upon a case appealed to the county court from a justice's court, where the amount in controversy does not exceed two hundred dollars exclusive of the costs.<sup>8</sup>

<sup>1</sup> *Coyle v. Baldwin*, et al. 5 Cal. 75.

<sup>2</sup> *Howard v. Harman*, 5 Cal. 78.

<sup>3</sup> *Butler v. King*, 10 Cal. 342.

<sup>4</sup> *People v. Fowler*, 9 Cal. 85.

<sup>5</sup> *Denmark v. Lening*, 10 Cal. 68.

<sup>6</sup> *Hildreth v. Gunnison*, April Term, 1859.

## FORMS.

*Summons.*

State of California.

In the Justices' Court of the Second Township, in and for the City and County of San Francisco.

The People of the State of California to C. D., greeting:

You are hereby summoned to appear before me, at my office in the second township, in the city and county of San Francisco, on the fifteenth day of June, A. D. 1859, at twelve o'clock M., to answer unto the complaint of A. B., upon a promissory note, &c. [*describe it, stating the amount, &c.*], when judgment will be taken against you for the said amount, together with costs and damages, if you fail to appear and answer.

To the sheriff or any constable of said county, greeting:

Make legal service and due return hereof.

Given under my hand, this tenth day of June, A. D. 1859.

WM. CLARK, [L. s.]

Justice of the Peace of said Township.

*Order of Arrest.*

State of California,

City and County of San Francisco, }

The People of the State of California to the Sheriff or any Constable of said county:

You are hereby commanded to arrest the within-named defendant and bring him before me forthwith (at my office in said township), to answer the plaintiff's complaint, filed.

Given under my hand, this tenth day of June, A. D. 1859.

WM. CLARK, Justice of the Peace.

I hereby certify that I have served the above order, by arresting and bringing into court the said C. D., this tenth day of June, A. D. 1859.

WM. BLACK, Constable.

*Endorsement Deputizing Special Constable.*

At the request of the plaintiff, and on being satisfied that it is expedient, I hereby especially deputize A. H. Johns, a discreet person, and of suitable age, and not interested in the action, to serve and return the within writ, and the within attachment.

June 10th, 1859.

WM. CLARK,

Justice of the Peace.

*Complaint on Written Instrument.*

In the Justices' Court of the Second Township.

State of California,  
City and County of San Francisco, } ss:

A. B. }  
against }  
C. D. }

The above-named A. B., as plaintiff, commences this action in the justices' court of the second township, state of California, against the said C. D., a resident of said city and county, as defendant, and for cause of action complains and alleges as follows, to wit:

That heretofore, to wit, on the first day of April, in the year of our Lord one thousand eight hundred and fifty-nine, at the said city and county, the said defendant made his certain instrument in writing, bearing date on that day, in the words and figures following, to wit: [*here insert copy of the note,*] and then and there delivered the same to said plaintiff, who thereby became and still is the legal owner and holder thereof, and entitled to demand and receive the sum of money therein expressed.

And the said plaintiff avers that the said sum of money in said instrument mentioned, is now past due, and payable from the said defendant to said plaintiff, and that the said defendant, although the same has been duly presented and payment thereof demanded, unjustly neglects and refuses to pay the same or any part thereof, and that said sum, in said instrument mentioned, is still wholly due and unpaid, together with the interest due thereon.

Wherefore the said plaintiff claims and prays for a judgment of this honorable court against the said defendant for the said sum of [*amount of the note*] dollars, with interest thereon, from the first day of April, A. D. 1859, at the rate of two per cent. per month, besides costs of suit.

Dated San Francisco, this tenth day of June, A. D. 1859.

JOHN BROWN, Plaintiff's Attorney.

*Affidavit for Order of Arrest.*

In the Justice's Court of the Second Township.

State of California,  
City and County of San Francisco, } ss.

A. B. }  
against }  
C. D. }

A. B., the plaintiff in this suit, being duly sworn, deposes and says, that the cause of action in this case arose after the passage



of the act of the legislature of the state of California, entitled "An Act to regulate Proceedings in Civil Cases in the Courts of Justice of this State," passed April 29th, 1851; that it is an action for the recovery of money or damages, in a cause of action arising upon an express contract, and that the defendant is about to depart from this state with the intent to defraud his creditors. [Or set out other cause of arrest, as may be.]

And deponent further states and shows to the court the following facts and circumstances [or of other ground of arrest] in support of the above allegations of fraud, that is to say: [here state the facts and circumstances particularly.] A. B.

Sworn to before me, this tenth day of June, A. D. 1859.

WM. CLARK, Justice of the Peace.

*Undertaking on Order of Arrest.*

Justices' Court, Second Township.

State of California,  
City and County of San Francisco, } ss:

A. B. }  
against }  
C. D. }

Whereas, an order to arrest the above-named defendant has been this day issued, now, therefore, we, the undersigned, do undertake on the part of the above-named plaintiff, that if the defendant recover judgment the said plaintiff will pay all costs that may be awarded to the defendant, and all damages which he may sustain by reason of the said arrest—not exceeding two hundred dollars.

Witness our hands and seals in the city and county of San Francisco, on the tenth day of June, A. D. 1859.

A. B. [L. s.]  
L. M. [L. s.]  
N. P. [L. s.]

Approved, WM. CLARK, Justice of the Peace.

[Affidavit of justification in usual form.]

*Undertaking by Defendant on Arrest.*

Justices' Court, Second Township.

State of California,  
City and County of San Francisco, } ss:

A. B. }  
against }  
C. D. }

Whereas, the above-named defendant has been arrested at the suit of the above-named plaintiff, now, therefore, we, the under-

signed, do undertake on the part of the above defendant, that he will render himself amenable to the process of the court during the pendency of the action, and such as may be issued to enforce the judgment therein; or that we will pay to the plaintiff the amount of any judgment which he may recover in this action, not exceeding two hundred dollars.

Witness our hands and seals in the city and county of San Francisco, on the tenth day of June, A. D. 1859. C. D. [L. s.]

E. F. [L. s.]

J. H. [L. s.]

Approved,

WM. CLARK, Justice of the Peace.

WM. CLARK,  
Justice of the Peace.

*Venire.*

Justices' Court, Second Township, before Wm. Clark, Esq., Justice of the Peace.

State of California,  
City and County of San Francisco, } ss:

A. B. }  
*against*  
C. D. }

The People of the State of California, to the Sheriff or any constable of said county, greeting:

You are hereby commanded to summon twelve good and lawful men, citizens of the city of San Francisco, and not from bystanders, to act as jurors to try the issue in the above-entitled cause; said jurors to meet at my office in said township, for said purpose, on the twentieth day of June, A. D. 1859, at 12 o'clock precisely.

Make lawful return hereof.

Given under my hand this fifteenth day of June, A. D. 1859.

WM. CLARK, Justice of the Peace of said Township.

*Writ of Attachment.*

Justices' Court, Second Township, }  
City and County of San Francisco. }

A. B. }  
*against*  
C. D. }

The People of the State of California, to the Sheriff or any Constable of the City and County of San Francisco, greeting:

You are hereby commanded to attach and safely keep all the property of the above-named defendant within this county, not exempt from execution, or so much thereof as may be sufficient to satisfy the plaintiff's demand, to wit: fifty dollars, beside the costs; unless the said defendant shall give you security by

an undertaking in two sufficient sureties, for said amount and costs, in which case you will take such undertaking.

Make due return hereof.

Given under my hand, and dated at the second township, on the twentieth day of June, A. D. 1859.

WM. CLARK,  
Justice of the Peace of said Township.

*Notice of Attachment.*

City and County of San Francisco, June 15th, 1859.

A. B. }  
against  
C. D. }

To L. M.: By virtue of an attachment issued out of the justices' court, and to me directed, against above defendant, I attach all moneys, debts, effects and credits in your hands, or under your control, belonging to above defendant, or so much thereof as will satisfy the claim, to wit: fifty dollars, with cost and accruing cost.

Witness my hand, this twentieth day of June, A. D. 1859.

WM. BLACK, Constable.

*Execution.*

United States of America. }  
State of California, } ss.  
City and County of San Francisco, }  
Justices' Court, Second Township.

The People of the State of California, to the Sheriff or any Constable of the County of , greeting :

JUDGMENT.	Damages	- - -	\$50 00
	Costs	- - -	10 00
			\$
ACCRUING COSTS.	Execution and Filing	- - -	\$1 00
	Levy	- - -	1 50
	Percentage	- - -	2 50
	Advertisement	- - -	8 00
	Keeping	- - -	5 00
			\$18 00

Whereas, a judgment was rendered before me, a justice of the peace for the second township in said city and county of San Francisco, on the 15th day of June, A. D. 1859, against C. D., and in favor of A. B., for the sum of fifty dollars, damages;

and ten dollars, costs of suit.

These are therefore to command you, that out of the personal property, and if sufficient personal property cannot be found, then out of the real property of the said C. D., you levy and cause to be made, by distress and sale of the said amount of fifty dollars damages, and ten dollars costs of suit, together with the

cost that may accrue—and of this writ make legal service and due return within sixty days from the date hereof.

Given under my hand this sixteenth day of June. A. D. 1859.

WM. CLARK, [L. S.]

Justice of the Peace of said Township.

*Undertaking a Release of Attachment.*

Know all men by these presents, that we, C. D., as principal, and E. F., and J. H., as sureties, all of the city and county of San Francisco, are held and firmly bound unto A. B., of the city and county aforesaid, in the sum of two hundred dollars, lawful money of the United States of America, to be paid to the said A. B., his heirs, executors, administrators or assigns; for which payment, well and truly to be made, we bind ourselves, our heirs, executors, administrators or assigns, jointly and severally, firmly by these presents.

Sealed with our seals. Dated this twentieth day of June, 1859.

Now the condition of this obligation is such, that, whereas a writ of attachment has issued against the above bounden C. D. at the suit of A. B., and certain of his goods and chattels have been attached under and by virtue thereof. Now, in consideration of the release of said goods and chattels from such attachment, if the said C. D. shall well and truly pay any judgment and costs that the said A. B. may recover against him, the said C. D., then this obligation to be null and void: otherwise to remain in full force and effect.

C. D. [L. S.]

E. F. [L. S.]

J. H. [L. S.]

[*Affidavit of justification in usual form.*]

*Order on Garnishee to Appear and Answer.*

United States of America, Justices' Court, Second Township.

State of California,

City and County of San Francisco, } ss:

A. B.

against }

C. D.

The People of the State of California, to R. S., greeting:

Whereas it has been alleged and made to appear to the undersigned, one of the justices of the peace of said township, that an execution has been duly issued out of this court against the property of the above-named defendants and is still in force; and that you have in your possession or under your control certain debts,

moneys, effects, credits and other property owing to or belonging to the said defendant,

You are therefore commanded, to be and appear before me, at my office in said township, in said county, on the twenty-fifth day of July, A. D. 1859, at twelve o'clock M., then and there to be examined on oath concerning the same; and you are further commanded not to pay, transfer, return or otherwise part with or dispose of any such debts, moneys, effects, credits, or other property, until duly released according to law.

Given under my hand, this first day of July, A. D. 1859.

WM. CLARK, [L. S.]

Justice of the Peace of said Township.

*Constable's Jury Summons.*

Justices' Court, Second Township.

To Mr. L. M.: You are hereby notified and required to attend before the justices' court of the second township, on the fifteenth day of June, at twelve o'clock M., in the court-room in the city and county of San Francisco, then and there to serve as a juror.

Herein fail not, under the penalty of the law.

WM. BLACK, Constable.

*Attachment for Defaulters.*

Justices' Court, Township.

State of California, }  
City and County of San Francisco, }

The People of the State of California, to the Sheriff or Constable of said County, greeting:

You are hereby commanded forthwith to attach the body of L. M., a defaulting juror, and have him before our said court, on Saturday, the sixteenth day of June, 1859, then and there to show cause why he should not be punished for contempt, in disobeying the mandate of said court.

WM. CLARK,

Justice of the Peace of said Township.

*Notice of Transfer of Cause.*

Justices' Court, Second Township:

State of California, }  
City and County of San Francisco, }

Edward T. Ludus, }

against

E. J. Baldwin. }

To the Plaintiff and Defendant:

Please take notice that the above-entitled case, transferred to this court from the fifth township, justices' court, is set for trial

before me at my court-room in said second township, June 29th, A. D. 1859, at two o'clock, P. M. Yours, &c.

WM. H. CULVER.  
Justice of the Peace.

San Francisco, June 22d, A. D. 1859.

*Satisfaction of Judgment.*

Justices' Court of the Second Township.

State of California,  
City and County of San Francisco. }

A. B. }  
*against* }  
C. D. }

Satisfaction is acknowledged between A. B. the plaintiff and C. D. the defendant, for the sum of fifty dollars, being the amount of a judgment entered in the judgment book of the justices' court, city and county of San Francisco, the sixteenth day of June, one thousand eight hundred and fifty-nine.

A. B. [L. s.]

State of California,  
City and County of San Francisco, } ss :

On this first day of September, A. D. one thousand eight hundred and fifty-nine, before me, Wm. Clark, a justice of the peace, in and for the said county, personally appeared A. B., to me personally known to be the individual described in and who executed the annexed instrument, and acknowledged to me that he executed the same freely and voluntarily, and for the uses and purposes therein mentioned.

In witness whereof, I have hereunto set my hand and affixed my official seal, the day and year first above written.

WM. CLARK, Justice of the Peace.

*Notice of Appeal.*

City and County of San Francisco, }  
Justices' Court of the Second Dis- }  
trict Township. }

A. B. }  
*against* }  
C. D. }

You will please take notice, that the defendant in this action above named, hereby appeals to the county court of the city and county of San Francisco, from the judgment therein made and entered in the justices' court on the fifteenth day of June, A. D. 1859, in favor of said plaintiff, against defendant, and from the

whole thereof, this appeal is taken on questions of law and fact, [or, this appeal is taken on questions of law alone.]

Dated, San Francisco, this fifteenth day of June, A. D. 1859.

Yours, &c., JAMES LICK, Attorney for Appellant.

To the Justices of said Justices' Court, and JOHN BROWN, Attorney for Respondent.

*Affidavit to Prosecute Appeal.*

State of California, }  
City and County of San Francisco, } ss. Second Township.  
John Brown }  
against }  
Peter Jackson. }

Peter Jackson being duly sworn, deposes and says, that he is the appellant in the above-entitled action; that the appeal is taken in good faith, and that he intends to perfect said appeal.

Sworn and subscribed this 9th } PETER JACKSON.  
day of June, A. D. 1859, before me, }

ROBERT BASSET, Justice of the Peace, 2d Township.

*Undertaking an Appeal.*

State of California.

In the Justices' Court of the Second Township, in and for the City and County of San Francisco.

Know all men by these presents, that we, C. D., as principal, and E. F. and J. H. as sureties, are held and firmly bound unto A. B., his executors, administrators and assigns, in the full sum of two hundred dollars, to the payment of which, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents.

Signed with our hands, and sealed with our seals, this sixteenth day of June, A. D. 1859.

The condition of the above undertaking is this, that whereas the said A. B. obtained a judgment against the said C. D., before William Clark, Esq., justice of the peace of the second township, city and county aforesaid, on the fifteenth day of June, A. D. 1859, for fifty dollars costs, and whereas the above bounden C. D. is desirous of appealing from the decision of said justice, to the county court of the city and county of San Francisco.

Now, if the above bounden C. D. shall well and truly pay, or cause to be paid, the amount of said judgment and all costs, and obey any order the said county court may make therein, if the said appeal be withdrawn or dismissed; or pay the amount of any judgment and all costs that may be recovered against the

said appellant, in the said county court, and obey any order the said court may make therein, then this obligation to be null and void, otherwise in full force and virtue.

C. D. [L. s.]

E. F. [L. s.]

J. H. [L. s.]

[*Affidavit of justification to be added.*]

*Complaint for Taking Personal Property.*

State of California, City and County of }  
 San Francisco, in the Justices' Court }  
 of the Second Township.

A. B. }  
*against* }  
 C. D. }

City and County of San Francisco, ss:

A. B., plaintiff in this action, by John Brown, his attorney, complains of C. D., resident of said city and county, defendant, and for cause of action shows:

That heretofore, to wit: on the first day of May, in the year of our Lord one thousand eight hundred and fifty-nine, at the said city, the said defendant, with force and arms, seized and took certain goods and chattels of the plaintiff, to wit: [*here describe the property,*] of great value, to wit: of the value of one hundred dollars, and carried away the same and converted and disposed thereof to his own use, and other wrongs to the plaintiff, then and there did, against the peace of the people of the state of California, and to the damage of the said plaintiff, of one hundred dollars. And the said plaintiff further alleges, that the said defendant refuses to return said property, although demand has been made therefor.

Wherefore he brings this suit, and prays judgment against the said defendant, for his damages aforesaid, to one hundred dollars and his costs, and that execution to enforce the same may issue as well against the body of the said defendant as against his estate.

JOHN BROWN, Plaintiff's Attorney.

City and County of San Francisco, ss:

A. B., the plaintiff, being sworn, deposes and says, that he has read the foregoing complaint: and knows the contents thereof, that the same is true, of his own knowledge, except as to the matters which are therein stated on his information and belief, and as to those matters, that he believes it to be true.

Sworn to before me, this }  
 first day of June, A. D. 1859. }

A. B.

L. M., Justice, &c.



*Complaint on Claim and Delivery of Personal Property.*

In the Justices' Court of the Second Township.

State of California,  
City and County of San Francisco, } ss:  
A. B. }  
against }  
C. D. }

The above-named plaintiff complains of the above-named defendant, a resident of said city and county, and for cause of action respectfully shows to this honorable court, that heretofore, to wit: on the first day of June, A. D. 1859, at the city and county of San Francisco, the defendant has become possessed of, and wrongfully detains from the plaintiff the following goods and chattels, the property of the plaintiff, that is to say [*here describe the property*], the same being of the value of one hundred dollars; and the plaintiff further alleges that the said defendant refuses to return said property although demand has been made therefor.

Wherefore the plaintiff demands that the defendant may be adjudged to deliver forthwith to the plaintiff the said goods and chattels, and to pay to the plaintiff damages for the detention thereof, to the sum of one hundred dollars, or to pay to the plaintiff the sum of one hundred dollars, the value thereof, in case the delivery is not made, together with the costs of this action, or that such further or other relief in the premises may be given to the said plaintiff as may be just and equitable.

JOHN BROWN,  
Plaintiff's Attorney.

[*Affidavit as preceding.*]

*Affidavit on Claim and Delivery of Personal Property.*

State of California,  
City and County of San Francisco, } ss:  
Second Township,  
A. B. }  
against }  
C. D. }

A. B., plaintiff in this action above named, being duly sworn, deposes and says, that the said plaintiff is the owner of and is lawfully entitled to the possession of the following described property, to wit: [*here describe the property*], that the said property is in possession of, and wrongfully detained by the above-named defendant, and that the alleged cause of said detention, according to this deponent's best knowledge, information, and belief, is as follows, to wit: [*here state the cause*], that the said property, or any part thereof, has not been taken for a tax, assessment, or fine, pursuant to a statute, or seized under an execution, or an attachment

**RETURN OF CALIFORNIA LAWYER**

against the property of the said plaintiff, and that the actual value of said property is one hundred dollars. A. B.

Signed and sworn to before me this

first day of June, A. D. 1859.

J. M. Justice of the Peace.

**Order to take the Property.**

State of California }  
City and County of San Francisco }  
Second Township }

The People of the State of California, to the Sheriff or any constable of said county, greeting:

You are hereby commanded to take the within-described property from the defendant, C. D., and deliver the same to the plaintiff, A. B., in his complying with the requirements of section 104 of the act entitled "An Act to Regulate Proceedings in Courts of Justice of the State."

Witness my hand this first day of June, A. D. 1859.

Wm. Clark, Justice of the Peace.

**Undertaking on Claim and Delivery of Personal Property.**

State of California }  
City and County of San Francisco }  
Second Township }

A. B. }  
vs. }  
C. D. }

Whereas, the above-named plaintiff has this day filed his complaint in this court against the said defendant, claiming the delivery of [here describe the property]. Now, therefore, we, A. B., principal, and E. F. and I. H., sureties, do hereby agree and undertake, in consideration of said delivery, in the sum of two hundred dollars, for the prosecution of the action for the return of the said property, if return thereof be adjudged by the court, and for the payment to the defendant of such sum as shall, for any cause, be recovered against said plaintiff, not exceeding one hundred dollars.

In witness whereof, we have hereunto set our hands and seals, this first day of June, A. D. 1859.

A. B. [L. s.]  
E. F. [L. s.]  
I. H. [L. s.]

Approved, Wm. Black, Constable.

*Affidavit of Justification.*

State of California,  
City and County of San Francisco, }

E. F. and I. H., sureties in the within undertaking, being duly sworn, say, each for himself, and not one for the other, that he is worth the sum of two hundred dollars, over and above all legal debts and liabilities, of property not exempt from execution, and is a resident and freeholder or householder of said county.

Subscribed and sworn to before me, }  
this first day of June, A. D. 1859. }

E. F.  
I. H.

WM. CLARK, Justice of the Peace.

*Undertaking on Attachment.*

Justices' Court, Second Township,  
State of California, }  
City and County of San Francisco. }

A. B. }  
against }  
C. D. }

Whereas, an attachment against the property of the above-named defendant has been demanded and is about to issue. Now, therefore, we, the undersigned, do undertake on the part of the above-named plaintiff, that if the defendant recover judgment, or if the attachment should be dismissed, the said plaintiff will pay all costs that may be awarded to the defendant, and all damages which he may sustain by reason of the said attachment, not exceeding the sum of two hundred dollars.

Witness our hands and seals in the city and county of San Francisco, on the first day of June, A. D. 1859.

Approved, WM. CLARK,  
Justice of the Peace.

A. B. [L. s.]  
E. F. [L. s.]  
I. H. [L. s.]

[*Affidavit of justification as in other forms.*]

*Affidavit for Attachment.*

In the Justices' Court of the Second Township, in and for the City and County of San Francisco.

A. B. }  
against }  
C. D. }

City and County of San Francisco, ss:

A. B., the plaintiff in the action above named, being duly sworn, deposes and says, that the defendant above named is indebted to him, the said plaintiff, in a certain sum, that is to say,

in the sum of two hundred dollars, over and above all legal set-offs and counter-claims, upon an express contract for the direct payment of money, and that such contract was made and is payable in this state, and that the payment of the same has not been secured by any mortgage on real or personal property.

And this deponent further says, that he, this deponent, has good reason to believe, and does believe, that the following cause for issuing an attachment in this action actually exists at the time of making this affidavit, to wit: that the said defendant, the debtor above named, is a non-resident of this state [*or state other ground of attachment as per statute*], that the facts upon which such belief is founded, are as follows: [*here state the facts.*] A. B.

Sworn and subscribed before me, this }  
first day of June, A. D. 1859. }

WM. CLARK, Justice of the Peace.

### *Bond of Indemnity.*

Know all men by these presents, that we, C. D., as principal, E. F. and I. H., as sureties, are held and firmly bound unto Wm. Black, constable of the second township of the city and county of San Francisco and state of California, in the sum of two hundred dollars, for the payment whereof well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly, severally and firmly by these presents.

Witness our hands and seals, at said county, this 20th day of June, 1859.

The condition of the above obligation is such, that whereas in a certain suit at law lately pending before Wm. Clark, Esq., justice of the peace of the second township of said city and county, wherein A. B. was plaintiff and C. D. was defendant, a writ of attachment bearing date the first day of June, 1859, has issued, directed to said constable to execute: and whereas the following property [*here describe the property*] has been seized and taken, by virtue and under the authority of said writ, now if the said C. D. shall save and keep said Wm. Black, constable as aforesaid, harmless in the matter, and well and truly pay all damages, costs and expenses which said constable may incur by reason of the return of said property, or of the claim, estate or title of the said A. B., or any other person or persons to or in the same, then the above obligation to be void, otherwise to remain in full force and effect.

Executed in presence of }

C. D. [L. s.]

E. F. [L. s.]

I. H. [L. s.]

[*With the usual affidavit of justification.*]

*Complaint—Forcible Entry, &c.*

In the Justices' Court of the Second Township of the State of California, in and for the City and County of San Francisco.

John Brown }  
           *against* }  
 William Jones. }

City and County of San Francisco, ss:

John Brown, the plaintiff in this suit, by William Smart, his attorney, complains of William Jones, the defendant, a resident of said city and county, and, for cause of complaint, shows that at the time of the commencing of the wrongs hereinafter complained of, he was, and for a long time before that had been, in the peaceable and quiet possession of, and is still entitled to the possession of, that certain piece or parcel of land, lying and being situate in the city of San Francisco, and bounded and described as follows, to wit: [*here describe the property.*]

And the said plaintiff further alleges that being so in the peaceable and quiet possession of said described premises, and entitled to the possession of the same, the said defendant, on, &c., with great force and violence, and with a multitude of people, unlawfully entered on said described premises, and with force and violence removed, put out and expelled the said plaintiff therefrom, and took possession of the same, and the said William Jones has ever since illegally, forcibly and unlawfully detained possession of the same from plaintiff, to his great damage, to wit: the sum of one hundred dollars, and said plaintiff alleges that the monthly value of the rents and profits of said premises is fifty dollars. Plaintiff therefore prays for judgment against the said defendant for the restitution of the above-described premises, and for the damages suffered by said plaintiff by the said forcible and unlawful entry upon, and forcible and illegal detention of the above-described premises, for the monthly rents and profits during the said unlawful detention, and that said damages may be trebled, and for such other and further relief as by law and right they may be entitled to, and for their costs in this behalf expended.

JOHN DANIEL ROGERS, Plaintiff's Attorney.

City and County of San Francisco, ss:

John Brown, the plaintiff, being sworn, deposes and says that he has read the foregoing complaint, and knows the contents thereof, that the same is true of his own knowledge, except as to the matters which are therein stated on his information and belief, and as to those matters that he believes it to be true.

JOHN BROWN.

Sworn to before me, this tenth day of April, A. D. 1859.

WM. CLARK, Justice of the Peace.

*Summons.—Forcible Entry, &c.*

In the Justices' Court of the Second Township, City and County of San Francisco.

John Brown

against

William Jones.

The People of the State of California to the Sheriff or any constable of said county, greeting:

Whereas, John Brown, of the city and county of San Francisco, hath exhibited unto me, a justice of the peace of said city and county, a complaint against William Jones, of the said city and county, wherein he alleges that he has been in the peaceable and quiet possession of, and is still entitled to the possession of, that certain piece or parcel of land, lying and being situate in the city of San Francisco, and bounded and described as follows, to wit: [*here describe the property*] and the said plaintiff further alleges that being so in the peaceable and quiet possession of said described premises, and entitled to the possession of the same, the said defendant, on, &c., with great force and violence, and with a multitude of people, unlawfully entered on said described premises, and with force and violence removed, put out and expelled the said plaintiff therefrom, and took possession of the same, and the said William Jones has ever since illegally, forcibly and unlawfully detained possession of the same from plaintiff, to his great damage, to wit: the sum of one hundred dollars. And the plaintiff alleges that the monthly value of the rents and profits of said premises is fifty dollars. Plaintiff therefore prays for judgment against the said defendant for the restitution of the above-described premises, and for the damages suffered by said plaintiff by the said forcible and unlawful entry upon, and forcible and illegal detention of the above-described premises, for the monthly rents and profits during the said unlawful detention, and that the damages may be trebled, and for such other and further relief as by law and right they may be entitled to, and for their costs in this behalf expended.

You are therefore commanded to summon the said William Jones, if he be found in your county, to be and appear before me at my court-room in said township, in said city and county of San Francisco, on the 25th day of May, 1859, at the hour of eleven A. M., then and there to make answer unto the complaint aforesaid.

Given under my hand this 9th day of May, 1859.

WM. CLARK, Justice of the Peace.

I hereby certify the above to be a true and correct copy of the original summons by me issued in the above-entitled cause.

WM. CLARK, Justice of the Peace, Second Township.

*Writ of Restitution.*

State of California, }  
 City and County of San Francisco. } Second Township.  
 The People of the State of California to the Sheriff and constable  
 of the county aforesaid :

Whereas John Brown, of the city and county of San Francisco, at a court of inquiry of a forcible entry and unlawful detainer held at my office in the county aforesaid, on the first day of May, A. D. 1859, before me, a justice of the peace for the county aforesaid, by the consideration of the court, hath recovered judgment against William Jones, to have restitution of all that [*here insert description*].

You are therefore commanded that, taking with you the force of the county, if necessary, you cause the said William Jones to be immediately removed from the aforesaid premises, and the said John Brown to have peaceable restitution of the same.

And you are also commanded that of the goods and chattels of the said William Jones within said county, you cause to be made the sum of one hundred dollars for the said plaintiff, together with the costs of suit endorsed thereon, and make return hereof within thirty days from this date.

Given under my hand, this twelfth day of May, A. D. 1859.

WM. CLARK, Justice of the Peace.

*Form of Transfer of Criminal Examination.*

State of California, }  
 City and County of San Francisco. }

The within-named defendant having been brought before me, in compliance with the requirements of the within writ, and in consequence of my inability to hear and try him thereon,

You are hereby required to take said defendant before the honorable police judges' court of the city and county of San Francisco [*or, in other counties before A. B., another justice*], as soon as possible, for hearing.

WM. H. CULVER,

Justice of the Peace.

*Search Warrant.*

State of California, }  
 County of }  
 The People of the State of California, to any Sheriff, Constable,  
 Marshal, or Policeman, in the City and County of San Francisco :

Proof, by affidavit, having been this day made before me by A. B., that John Doe did on the first day of June, A. D. 1859,

at the city and county of San Francisco, feloniously steal, take, and carry away two dozen silver forks,

You are therefore commanded, in the daytime, to make immediate search on the person of John Doe, or at his dwelling-house, in this county, for the following property; twenty-four silver forks with the initials A. B. engraved thereon, and if you find the same or any part thereof, to bring it forthwith before me at the police judges' court.

Given under my hand, and dated this first day of June, A. D. 1859. A. B., Justice of the Peace.

For other criminal forms, see title *MAGISTRATE*.

#### JUSTICES' FORMS IN OREGON.

##### *Form of a Certificate of Election.*

State of Oregon, } ss:  
County of

I do hereby certify that at an election held on the      day of      A. D. 18      , in the presence of      , in said county, J. P. was duly elected a justice of the peace. In testimony whereof, I have hereunto set my hand, with the seal of the board of county commissioners hereunto affixed this      day of      A. D. 18      .

[L. s.] C. D., Clerk of the Board of County Commissioners.

##### *Oath of Office.*

State of Oregon, }  
County of

I, J. P., do solemnly swear [*or, affirm, as the case may be*] that I will support the constitution of the United States, and the laws and constitution of this state; that I will administer justice without respect to persons, and faithfully and impartially discharge and perform all duties incumbent upon me as a justice of the peace, according to the best of my ability. J. P.

Subscribed and sworn to before me this      day of      A. D. 18      . C. D. Clerk of the District Court.

##### *Official Bond.*

Know all men by these presents, that we, J. P., A. B. and C. D. are held and firmly bound, unto the board of commissioners of the county of      in the state of Oregon, in the sum of



five hundred dollars, for the payment of which we jointly and severally bind ourselves, our heirs, executors and administrators.

Sealed with our seals, dated this                      day of                      A. D. 18                      .

Whereas, the said J. P. has been duly elected a justice of the peace in and for the precinct of                      in the county of                      A. D. 18                      . Now the condition of the above obligation is such, that if the said J. P. shall faithfully pay over, according to law, all moneys which shall come into his hands by virtue of his office as justice of the peace, then this obligation shall be void, otherwise in full force.

J. P. [L. s.]  
A. B. [L. s.]  
C. D. [L. s.]

*Form of Deputizing a Special Officer.*

At the request and risk of the plaintiff [*or, defendant, as the case may be*], I authorize A. B. to execute and return this writ.  
S. F., Justice of the Peace.

*Form of a Summons.*

State of Oregon, }  
County of                      . } ss :  
To the Sheriff, or any Constable of said County :  
In the name of the people of the state of Oregon, you are hereby commanded to summon C. D., if he be found in your county, to be and appear before the undersigned, a justice of the peace in and for the said county, on the                      day of                      , A. D. 18                      , at                      o'clock in the                      noon, at his office in                      to answer to A. B. in a civil action ; and have you then and there this writ.

Given under my hand this                      day of                      , A. D. 18                      .  
J. P., Justice of the Peace.

*Form of a Warrant.*

State of Oregon, }  
County of                      . }  
To the Sheriff, or any Constable of said County :  
In the name of the people of the state of Oregon, you are hereby commanded to take the body of C. D., if he be found within your county, and bring him forthwith before the undersigned, one of the justices of the peace in and for said county, at his office in                      , to answer A. B. in a civil action ; and you are hereby commanded to give due notice thereof to the said plaintiff, his agent or attorney ; and have you then and there this writ.

Given under my hand, this                      day of                      , A. D. 18                      .  
J. P., Justice of the Peace.

*Form of a Subpoena.*

State of Oregon, )

County of )

To the Sheriff, or any Constable of said County:

In the name of the people of the state of Oregon, you are hereby commanded to appear before the undersigned, one of the justices of the peace in and for said county, on the \_\_\_\_\_ day of \_\_\_\_\_, 18\_\_\_\_, at \_\_\_\_\_ o'clock in the \_\_\_\_\_ noon, at his office in \_\_\_\_\_, to give evidence in a certain cause, then and there to be tried between A. B., plaintiff and C. D., defendant, on the part of the plaintiff or defendant as the case may be.

Given under my hand, this \_\_\_\_\_ day of \_\_\_\_\_, 18\_\_\_\_.

J. P., Justice of the Peace.

*Form of a Venue for a Jury.*

State of Oregon, )

County of )

To the Sheriff, or any Constable in said County:

In the name of the people of the state of Oregon, you are hereby commanded to summon six good and lawful men of your county, to be and appear before the undersigned, one of the justices of the peace in and for said county, for the \_\_\_\_\_ day of \_\_\_\_\_, 18\_\_\_\_, at \_\_\_\_\_ o'clock in the \_\_\_\_\_ noon of said day, at his office in \_\_\_\_\_, to make a jury for the trial of a civil action between A. B., plaintiff, and C. D., defendant, and have you then and there this writ.

Given under my hand, this \_\_\_\_\_ day of \_\_\_\_\_, 18\_\_\_\_.

J. P., Justice of the Peace.

*Form of Execution.*

State of Oregon, )

County of ) ss.

To the Sheriff or any Constable of said County:

Whereas judgment against C. D., for the sum of \_\_\_\_\_ dollars, and for \_\_\_\_\_ dollars, costs of suit, was recovered on the \_\_\_\_\_ day of \_\_\_\_\_, 18\_\_\_\_, before the undersigned, one of the justices of the peace in and for said county, at the suit of A. B.: These are therefore, in the name of the people of the state of Oregon, to command you to levy on the goods and chattels of the said C. D. (excepting such as the law exempts), and make sale thereof according to law, to the amount of the said sum, and the costs upon this writ, and the same return to me within thirty days, to be rendered to the said A. B. for his debt, interest and costs.

Given under my hand, this \_\_\_\_\_ day of \_\_\_\_\_, 18\_\_\_\_.

J. P., Justice of the Peace.

*Form of Execution against the Body.*

State of Oregon, } ss.  
County of }  
To the Sheriff, or any Constable of said County:  
Whereas judgment against C. D., for the sum of            dollars, and for            dollars, costs of suit, was recovered on the            day of           , 18           , before the undersigned, one of the justices of the peace in and for said county, at the suit of A. B., and an execution against his property, returned unsatisfied: These are therefore, in the name of the people of the state of Oregon, to command you to take the body of the said C. D., and him convey and deliver to the keeper of the jail of the said county, who is hereby commanded to receive and keep the said C. D. in safe custody in prison, until the aforesaid sum, and all legal expenses, be paid and satisfied, or until he be discharged therefrom by due course of law; and of this writ make due return within thirty days.  
Given under my hand, this            day of           , 18           .  
J. P., Justice of the Peace.

*Form of Execution against Principal and Surety, after Expiration of Stay of Execution.*

State of Oregon, } ss.  
County of }  
To the Sheriff, or any Constable of said County :  
Whereas judgment against C. D., for the sum of                    dollars, and for                    dollars, costs of suit, was recovered on the                    day of                   , 18                   , before the undersigned, one of the justices of the peace, at the suit of A. B.; and whereas, on the                    day of                   , 18                   , E. F. became surety to pay the said judgment and costs in                    month from the date of the judgment aforesaid, agreeably to law, in the payment of which the said B. D and E. F. have failed: These are therefore, in the name, &c., [*as in the common form.*]

*Form of Order in Replevin.*

State of Oregon, } ss.  
County of . }  
To the Sheriff, or any Constable of said County :  
In the name of the people of the state of Oregon, you are hereby commanded to take the personal property mentioned and described in the within affidavit, and deliver the same to the plaintiff, upon receiving a proper undertaking, unless before such de-

livery the defendant enter into a sufficient undertaking for the delivery thereof to the plaintiff, if delivery be adjudged.

Given under my hand, this            day of            , 18   .  
J. P., Justice of the Peace.

*Form of a Writ of Attachment.*

State of Oregon,            } ss.  
County of            }

To the Sheriff, or any Constable of said County:

In the name of the people of the state of Oregon, you are commanded to attach and safely keep the goods and chattels, moneys, effects and credits of C. D. (excepting such as the law exempts), or so much thereof as shall satisfy the sum of            dollars, with interest and costs of suit, in whosoever hands or possession the same may be found in your county, and so provide that the goods and chattels so attached may be subject to further proceedings thereon, as the law requires; and of this writ make legal service and due return.

Given under my hand, this            day of            , 18   .  
J. P., Justice of the Peace.

*Form of Summons in Forcible Entry and Detainer.*

State of Oregon,            } ss.  
County of            }

To the Sheriff or Constable of said County:

Whereas A. B., of            , hath exhibited unto the undersigned, one of the justices of the peace in and for said county, a complaint against C. D., for a forcible entry and detainer of the following premises; to wit:            ; therefore in the name of the United States, you are hereby commanded to summon the said C. D., if he be found in your county, to appear before the undersigned, on the            day of            , 18   , at            o'clock in the            noon, at his office in            , then and there to make answer to and defend against the complaint aforesaid; and you are also hereby commanded to serve a copy of the said complaint on the said C. D., and of this writ make due return, with your doings thereon.

Given under my hand, this            day of            , 18   .  
J. P., Justice of the Peace.

*Form of Writ of Restitution in Forcible Entry and Detainer.*

State of Oregon,            } ss.  
County of            }

To the Sheriff or any Constable of said County:

Whereas, A. B. did make complaint in writing to the undersigned, a justice of the peace in and for said county, against

C. D. of the said county, that he had been guilty of a forcible entry and detainer of a certain tract of land [or, other possessions] of the said A. B., and whereas a jury was empanelled and sworn to inquire of said complaint, and did return their verdict that the said C. D. was guilty of a forcible entry and detainer of the following described tract of land, to wit: [*here describe the premises of which the defendant is found guilty of forcibly entering and detaining;*] and whereas judgment was entered thereon by said justice, and that the said A. B. should have restitution of the premises; therefore, in the name of the United States, you are hereby commanded to cause the said C. D. to be forthwith removed from the premises aforesaid, and that the said A. B. have peaceable restitution of the same; and also, that you levy of the goods and chattels of C. D., found in your county, the sum of            dollars, being the amount of costs, on the trial aforesaid, together with            dollars, for this writ, and also your own fees, and make return of this writ within thirty days next after the date hereof.

Given under my hand, this            day of            , 18 .  
J. P., Justice of the Peace.

*Form of Undertaking or an Arrest.*

Whereas, an application has been made by A. B., plaintiff, to J. P., one of the justices of the peace in and for            county, for a warrant to arrest C. D., defendant, founded upon an affidavit of the said plaintiff, setting forth that, &c.; [*here state the cause for the arrest:*] Now, therefore, we, A. B., plaintiff, and E. F., acknowledge ourselves bound to C. D. in the sum of            dollars, to pay all costs that may be awarded to the said defendant, and all damages which he may sustain by reason of the arrest, not exceeding the sum of            dollars.            A. B.

Dated this            day of            , 18 .            E. F.

*Form of Undertaking in Attachment.*

Whereas, an application has been made by A. B., plaintiff, to J. P., one of the justices of the peace in and for            county, for a writ of attachment against the personal property of C. D., defendant [a foreign corporation, a non-resident, or because he has assigned, secreted, &c.]: Now, therefore, we, A. B., plaintiff, and E. F., acknowledge ourselves bound to C. D. in the sum of            dollars, that if the defendant recover judgment in this action, the plaintiff will pay all costs that may be awarded to the defendant, and all damages which he may sustain by reason of the said attachment, not exceeding the sum of            dollars.

Dated the            day of            , 18 .            A. B.  
E. F.

*Form of Undertaking in Replevin.*

Whereas, A. B., plaintiff, has commenced an action before J. P., one of the justices of the peace in and for \_\_\_\_\_ county, against C. D., defendant, for the recovery of certain personal property mentioned and described in the affidavit of the plaintiff, to wit: [*here set forth the property claimed:*] Now, therefore, we, A. B., plaintiff, E. F. and G. H., acknowledge ourselves bound unto C. D. in the sum of \_\_\_\_\_ dollars, for the prosecution of the action for the return of the property to the defendant, if return thereof be adjudged, and for the payment to him of such sum as may for any cause be recovered against the plaintiff.

Dated the \_\_\_\_\_ day of \_\_\_\_\_, 18 \_\_\_\_ .  
A. B.  
E. F.  
G. H.

*Form of Undertaking to Discharge Attachment.*

Whereas, a writ of attachment has been issued by J. P., one of the justices of the peace in and for \_\_\_\_\_ county, against the personal property of C. D., defendant, in an action in which A. B. is plaintiff: Now, therefore, we, C. D., defendant, E. F. and G. H., acknowledge ourselves bound unto J. K., constable, in the sum of \_\_\_\_\_ dollars (double the value of the property), engaging to redeliver the property attached, to wit: [*here set forth a list of articles attached,*] or pay the value thereof to the sheriff or constable to whom execution upon a judgment obtained by the plaintiff in the aforesaid action, may be issued.

Dated this \_\_\_\_\_ day of \_\_\_\_\_, 18 \_\_\_\_ .  
C. D.  
F. F.  
G. H.

*Form of Undertaking to Indemnify Constable on Claim of Property by a Third Person.*

Whereas, L. M. claims to be the owner of, and have the right to the possession of certain personal property, to wit: [*here describe it,*] which has been taken by J. K., constable, in \_\_\_\_\_ county, upon an execution issued by J. P., justice of the peace in and for the county of \_\_\_\_\_, upon a judgment obtained by A. B., plaintiff, against C. D., defendant: Now, therefore, we, A. B., plaintiff, E. F. and G. H., acknowledge ourselves bound unto the said J. K., constable, in the sum of \_\_\_\_\_ dollars, to indemnify the said J. K. against such claim.

A. B.  
E. F.  
G. H.

## FORMS OF PROCEEDINGS IN CRIMINAL CASES.

*Form of Warrant.*

State of Oregon, }  
 County of           , } ss:  
 To the Sheriff, or any constable of said county:  
 Whereas, A. B. has this day complained in writing, under oath, to the undersigned, one of the justices of the peace in and for said county, that on the           day of           , 18   , at           , in said county: [*here insert the substance of the complaint, whatever it may be.*] Therefore, in the name of the people of the state of Oregon, you are commanded forthwith to apprehend the said C. D. and bring him before me to be dealt with according to law.

Given under my hand, this           day of           , 18   .  
 J. P., Justice of the Peace.

*Form of an Execution.*

State of Oregon, }  
 County of           , } ss:  
 To the Sheriff, or any constable of said county;  
 Whereas, at a justice's court held at my office in said county, for the trial of C. D., for the offence hereinafter stated, the said C. D. was convicted of having, on the           day of           , 18   , in said county, committed [*here state the offence*], and upon conviction, the said court did adjudge and determine that the said C. D. should pay a fine of           dollars, and           dollars costs; and whereas the said fine and costs have not been paid: These are, therefore, in the name of the people of the state of Oregon, to command you to levy on the goods and chattels, &c. [*as in execution in civil cases.*]

*Form of Certificate of Conviction.*

State of Oregon, }  
 County of           , } ss:  
 At a justice's court held at my office in said county, before me, one of the justices of the peace in and for said county, for the trial of C. D. for the offence hereinafter stated, the said C. D. was convicted of having, on the           day of           , 18   , at           , in said county of [*here insert the offence*], and upon conviction the said court did adjudge and determine that the said C. D. should pay a fine of           dollars [*or, be imprisoned, as the case may be*], and the said fine has been paid to me.

Given under my hand, this           day of           , 18   .  
 J. P., Justice of the Peace.

*Form of Commitment upon Sentence.*

State of Oregon, } ss:  
 County of           , }  
 To any constable, and the keeper of the common jail of said county:

Whereas, at a justice's court, held at my office in said county, for the trial of C. D. for the offence hereinafter stated, the said C. D. was convicted of having, on the       day of       18   , in said county, committed [*here state the offence*], and upon conviction, the said court did adjudge and determine that the said C. D. should be imprisoned in the common county jail of said county for       days: Therefore you, the said constable, are commanded, in the name of the people of the state of Oregon, forthwith to convey and deliver the said C. D. to the said keeper; and you, the said keeper, are hereby commanded to receive the said C. D. into your custody in the said jail, and him there safely keep until the expiration of said       days, or until he shall thence be discharged by due course of law.

Given under my hand, this       day of       , 18   .  
 J. P., Justice of the Peace.

*Form of Warrant to keep the Peace.*

State of Oregon, } ss:  
 County of           , }  
 To the sheriff, or any constable of said county:

Whereas, A. B. has this day complained in writing, under oath, to the undersigned, one of the justices of the peace in and for said county, that he has just cause to fear, and does fear that C. D., late of said county, will [*here state the threatened injury or violence, as sworn to*]: Therefore, in the name of the people of the state of Oregon, you are commanded to apprehend the said C. D. and bring him forthwith before me, to show cause why he should not give surety to keep the peace, and be of good behavior toward all the people of this state, and the said A. B. especially, and further to be dealt with according to law.

Given under my hand, this       day of       , 18   .  
 J. P., Justice of the Peace.

*Form of Commitment to answer in the District Court.*

State of Oregon, } ss:  
 County of           , }  
 To any constable, and to the keeper of the common jail of said county:

Whereas, on the       day of       18   , A. B. made complaint in writing, and on oath, before the undersigned, one of the jus-



tices of the peace in and for said county, charging C. D. with having, on the      day of      , 18      , committed the crime of larceny [*or other crime, as the case may be*], and the said C. D. having been brought before and examined by me, and it being sufficiently proved to me that the said C. D. has, in said county, committed the crime of larceny [*or other crime*], by stealing one bay horse, of the value of      dollars, of the goods and chattels of the said A. B.; and he, the said C. D., having failed to give bail for his appearance to answer at the next term of the District Court, in the sum of      dollars, as required by me: Therefore, in the name of the people of the state of Oregon, you, the said constable, are commanded forthwith to convey and deliver the said C. D. to the said keeper; and you, the said keeper, are hereby commanded to receive the said C. D. into your custody, in the said jail, and him there safely keep, until he be discharged by due course of law.

Given under my hand, this      day of      , 18      .  
J. P. Justice of the Peace.

*Form of Search Warrant.*

State of Oregon, { ss:  
County of      , }

To the sheriff, or any constable of said county:

Whereas, A. B., has this day made complaint on oath, to the undersigned, one of the justices of the peace in and for said county, that the following goods and chattels, to wit: [*here describe them,*] the property of the said A. B. have within      days past [*or, were on the      day of*], by some person or persons unknown, been, taken and carried away out of the possession of said A. B. in the county aforesaid; and also that the said A. B. verily believes that the said goods or a part thereof are concealed in, or about the house of C. D., in said county [*describing the premises to be searched:*] Therefore, in the name of the people of the state of Oregon, you are commanded that, with the necessary and proper assistance, you enter the said house [*describe the premises to be searched*], and there diligently search for the said goods and chattels, and if the same, or any part thereof be found on such search, bring the same, also the said C. D., forthwith before me, to be disposed of according to law.

Given under my hand this      day of      A. D. 18      .  
J. P. Justice of the Peace.

*Form of Commitment when Justice, on the Trial, shall find that he has no Jurisdiction of the Case.*

State of Oregon, }  
County of       , } ss:

To any constable, and to the keeper of the common jail of said county:

Whereas C. D., of &c., has been brought this day before the undersigned, one of the justices of the peace in and for said county, charged, on the oath of A. B., with having, on the day of       , 18   , in said county, committed the offence of [*here state the offence charged in the warrant*], and in the progress of the trial of said charge, it appearing to the said justice that the said C. D. has been guilty of the offence of [*here state the new offence found on the trial, committed at the time and place aforesaid, of which offence the justice has not final jurisdiction*]; and whereas the said C. D. has failed to give bail in the sum of       dollars, for his appearance to answer at the next term of the District Court, as required by me: Therefore, in the name of the people of the state of Oregon, &c., [*as in the last form.*]

## CHAPTER XXVI.

## LANDLORD AND TENANT.

THE term landlord is applied to one who furnishes the use and occupation of lands or tenements to another, who is called the tenant, for a compensation or return, which is termed rent. The right and condition or estate of the tenant, is called a tenancy. The respective relations of the parties are determined by the contract between them, which is named a lease or demise. When such contract is expressed in writing, the written instrument is itself called a lease, and the parties described therein, are respectively denominated lessor and lessee.

The period of time mentioned in the lease, for which the tenant or lessee is to have the use of the property is called the term.

If the term be for one year or less from the time of making the contract, a verbal lease or agreement to let, will be sufficient to bind the parties; but if the term be fixed for any longer period than one year, the lease must be expressed in writing duly executed under seal.<sup>1</sup>

If there be any agreement to make a lease at a future time, or if there be a lease made to commence at a future day, and such lease is for such a period of time that it will not expire within one year from the time of the contract, it must be in writing.<sup>2</sup>

Tenancies are for life, for years, at will, and at sufferance.

A transfer of lands or tenements, for the use of the tenant during his life, or the life of any other person, is a tenancy for life.

The ordinary tenancy which is held under the usual lease or agreement to let, is called a tenancy for years; which may be for

<sup>1</sup> Wood's Dig. art. 394, 396, 400.

<sup>2</sup> Statutes of Oregon, p. 326, §§ 6, 8.

a number of years or less than a year, a half year, a month, or even a few days. The principal distinguishing feature between a tenancy for years, and a tenancy at will, or other tenancy, is, that it be for a time certain, prefixed, by agreement either expressed or implied.

Tenancy at sufferance is a mere wrongful holding over of the land by one who came rightfully into possession. It cannot arise by contract, either express or implied, for, if the owner of the land were to assent to it, it would become a tenancy at will by means of that very assent.

A tenancy at will takes place where the demise or lease is for no certain term, but is to continue during the joint will of both parties. It may arise by implication, as, where a party agrees to buy a piece of land, and enters upon it before his deed is executed.<sup>1</sup> Its more important incident, however, is its capability of being extended into a tenancy from year to year, which is the condition of most of the tenancies of the present day, where there is no written lease, or where the term under the written lease has expired, and the tenant still continues to hold the premises with concurrence of the landlord. This tenancy derives its name from the circumstance, that in the more important leases, the rent is prescribed for the year; and where the written lease has expired, or no written lease is made, and the tenant continues to occupy without any new lease, but with assent of the landlord, he is considered as holding for another year. But the same designation, and the same rules of law apply to the tenancy, where the leasing is by the month or week, or other period.

To terminate such tenancy, due notice must be given. Formerly, in case of a tenancy at will, notice was not necessary. The later and more liberal rule seems to be, that tenants at will are regarded as holding from year to year, so far as to be entitled to notice to quit before they can be ejected by process of law.<sup>2</sup>

This notice must comply strictly with the rules of law. For a yearly tenancy, it should be a notice of six months; and for any shorter tenancy it should be as long as the term. If a quarterly tenancy, a quarter's notice; if monthly, a month's notice; if weekly, a week's notice.

<sup>1</sup> Smith's Land. and Ten. 16, 18.

<sup>2</sup> 4 Kent, 129.

It should be in writing, and should express clearly the period of time of the tenancy, and that the tenant is required to quit on the last day thereof; and should be served a full week, or month, or quarter, as the period of time may be, beforehand. To be safe, let it show the days of commencement and ending of the week, month or quarter, &c., and let it be served before the commencement of the week, month or quarter, &c., although if served on the day of commencement, it would, in most cases, be sufficient. Where the tenant wishes to terminate the tenancy, he should give notice to the landlord with like strictness.

If the tenant transfer his whole right to another, such transfer is called an assignment of the lease. If he make a transfer of a part of the term, or of a portion of the premises, it is an under-lease.

It is questionable, whether a restriction in a lease against assignment, can be enforced, so as to make a forfeiture in any case as it is in restraint of alienation, and therefore, against the policy of the law.<sup>1</sup> In New York it is well settled, that it cannot be so enforced.

If a lease contains a covenant not to assign, and the restriction is once removed, it operates as a removal of the restriction forever.<sup>1</sup>

When a lessee makes assignment of the lease to another, he is still liable to the lessor for the rent, unless the lessor accept the assignee as his tenant, either expressly or impliedly; as, by receiving rent from him as a tenant, and giving him receipt in his name. But it seems, an assignee may assign over, even to an insolvent person, and free himself from all future liability.<sup>2</sup>

A sub-tenant is liable to the original lessor for use and occupation, or for rent, only for the time he actually occupied the premises.<sup>3</sup>

An action for use and occupation can only be maintained where the relation of landlord and tenant exists.<sup>4</sup>

All conveyances of land by lease or otherwise, made for more than ten years, and all conveyances of town or city lots, or other real property for a longer time than twenty years, are declared by our statute, to be void.<sup>5</sup>

<sup>1</sup> 5 Cal. 49.

<sup>2</sup> Smith's Land. and Ten. 398.

<sup>3</sup> 1 Cal. 470.

<sup>4</sup> 8 Id. 196.

<sup>5</sup> Wood's Dig. art. 436.

A lease for a long period, such as years or lives, is a conveyance of an estate in land, and the tenant is entitled to the ordinary covenants and conditions of a leasehold estate. In the case of a lease for years, the tenant is entitled to the ordinary covenants and conditions of a leasehold estate, and the landlord is bound to give the tenant quiet enjoyment of the premises. The tenant is also entitled to the ordinary covenants and conditions of a leasehold estate, and the landlord is bound to give the tenant quiet enjoyment of the premises.

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<sup>1</sup> Wood's Dig. art. 878.

<sup>2</sup> 14, 204.

<sup>3</sup> 14, 204.

<sup>4</sup> Smith's Land. and Ten. 203.

<sup>5</sup> Wood's Dig. art. 2334.

<sup>6</sup> 3 Cal. 273, 284.

sion; or in case no one can be found in possession, in the next best manner, for instance, by making demand in a loud voice in front of the premises, or in the most conspicuous place thereon.

Three days after such demand of rent, notice must be served in writing, making demand of the tenant that he or she shall deliver possession of the premises. This notice must be absolute, and not in any way conditional. On neglect for three days longer to pay the rent, an action for the possession accrues to the landlord.<sup>1</sup>

By failing to pay rent when demanded, the contract under the lease is forfeited, and possession held after that is tortious.<sup>2</sup>

A waiver of the demand will never be implied for the purpose of making a forfeiture, for, from its very nature, a forfeiture cannot take place by consent, and is not favored by the rules of law.<sup>3</sup>

The acceptance of rent, which becomes due after a forfeiture, is a waiver of the forfeiture; even when the lease expresses that it shall become void upon breach of condition.<sup>4</sup>

Under the statutes mentioned above, an action for restitution accrues in like manner, where a tenant or under-tenant holds over against the will of the landlord after the lease has expired, or holds possession contrary to the covenants or conditions of the lease.<sup>5</sup>

But the action cannot be maintained under that act, against a tenant who has held over for one year after the expiration of the lease adversely or without payment of rent; nor against any person who continues in possession three years quietly and peaceably.

A person who enters into possession of land under another cannot question the title of him under whom he holds;<sup>6</sup> and it has been held that where a person is in quiet possession of premises, and takes a lease, he cannot afterward deny the title of the landlord, unless false and fraudulent representations were made to him to induce him to execute the lease.

Where a tenant finds there are adverse claimants to the property, he should file a bill of interpleader, making all the adverse

<sup>1</sup> Wood's Dig. art. 2594.

<sup>2</sup> 10 Cal. 802.

<sup>3</sup> 8 id. 284.

<sup>4</sup> Smith's Land. and Ten. 109, 114.

<sup>5</sup> 6 Cal. 169.

<sup>6</sup> 1 id. 470.

claimants parties thereto, and offer to pay the rents into court, to abide the ultimate decision of the case.<sup>1</sup>

Security for the payment of rent upon a lease may be given by the words, "I hereby agree to pay the rent stipulated above, when it shall become due, provided the said A. B. does not pay the same," written upon the lease at the time the lease is made; it being held that such an agreement, though not expressly a consideration, is a part of the lease, and not within the statute of frauds.<sup>2</sup> But it would be better to say, "For value received I hereby agree to pay," &c.

When the lease covenants to pay rent during the term, and to return the premises in good order and condition, natural wear and damages by the elements excepted, in case of destruction of the building by fire, the lessee is bound to pay rent for the whole term, but is not bound to restore the building, unless he has specially so contracted.

A covenant for a lease to be renewed indefinitely at the option of the lessee, is, in effect, the creation of a perpetuity, and is against the policy of the law.<sup>3</sup>

A covenant in a lease to the lessee, "his heirs and assigns," that, in the event of a sale by the lessor, the lessee is entitled to a refusal, is a covenant running with the land. Every covenant relating to the thing demised attaches to the land and runs with it.<sup>4</sup>

The valuable privilege of pre-emption attaches to the entire property, and is therefore assignable.<sup>5</sup>

A description of premises in a lease is sufficiently certain if the boundaries can be ascertained with a reasonable degree of certainty, and the lessee has occupied them under the lease.<sup>6</sup>

The landlord, in the absence of express agreement, is under an implied obligation to indemnify the tenant against eviction or disturbance by his own act, or the acts of those who claim under or paramount to him, but not against the tortious acts of third persons.<sup>7</sup>

Tenants have a right to remove buildings erected by them, at

<sup>1</sup> 8 Cal. 592.

<sup>2</sup> 5 id. 285.

<sup>3</sup> id. 64.

<sup>4</sup> 9 id. 662.

<sup>5</sup> 1 id. 470.

<sup>6</sup> Smith's Land. and Ten. 211.



any time before the expiration of their leases ; provided there be no forfeiture or re-entry for covenant broken.<sup>1</sup>

A tenant who puts up machinery for a mill in a house leased, and fastens it by bolts, screws, &c., to the house, has the right to remove it ; but as between vendor and vendee, such machinery would be considered as a part of the realty.<sup>2</sup>

When the owner of mortgaged premises leases the same for a term of years, and the rent is paid in advance by the tenant, the purchaser under the mortgage sale can require the tenant to pay the rent over again to him. After sale, and before redemption, the purchaser is entitled to the rents.<sup>3</sup>

Where the owner of a building leases a portion, and has access to the part reserved without going through the part leased, he has no implied right of way to the part reserved, through any portion of the lessee's premises.<sup>4</sup>

The foregoing principles apply generally to *Oregon* and *Washington*. Their statutory provisions are as follows :

#### OREGON.

Actions for the recovery of real property may be against any person acting as owner, landlord, or tenant ; and if the tenant is sued the landlord may be substituted on notice.

If the tenant defend, he must give the name and residence of his landlord in his answer.<sup>5</sup>

When in case of a lease of real property, and the failure of the tenant to pay rent, the landlord has a right to re-enter for such failure, he may bring an action to recover possession of the property, but if, at any time before judgment in such action, the lessee or his successor in interest pay to the plaintiff, or bring into court, the amount of rent then in arrear, with interest, and the costs of the action, and perform the other covenants or agreements on the part of the lessee, he shall be entitled to the possession, according to the terms of the lease.<sup>6</sup>

The person entitled to any premises, may recover possession

<sup>1</sup> 8 Cal. 86.

<sup>2</sup> 9 id. 119.

<sup>3</sup> 8 id. 502.

<sup>4</sup> 4 id. 245.

<sup>5</sup> Statutes O. 149.

<sup>6</sup> id. 150.

thereof in the manner hereinbefore provided in the following cases:

1. When any person shall hold over any lands or tenements, after the time for which they are demised or let to him, or to the person under whom he holds, or contrary to the conditions or covenants of any lease or agreement under which he holds.

2. When any rent shall have become due, or any such lease or agreement, and the tenant or person in possession shall have neglected or refused, for ten days after demand of the possession, made in writing, to deliver up possession of the premises, or pay the rent so due.

3. When any person shall continue in possession of any premises, sold by virtue of any mortgage or execution after the expiration of the time limited by law, for the redemption of such premises.

4. When any tenant at will or by sufferance shall hold over after the determination of his estate by a notice to quit, as provided by law.<sup>1</sup>

When the action shall be brought to recover the possession of premises demised, or let, for the reason that the tenant, or person in possession, has refused or neglected to pay the rent due; it shall be lawful for the defendant, at any time before judgment, to pay to the justice for the plaintiff, the rent then in arrear, with interest, and the costs of the action, and thereupon no writ of restitution shall be awarded.<sup>2</sup>

Whenever the lessee of any dwelling-house shall be convicted of the offence mentioned in the next preceding section [keeping a house of ill-fame], the lease or contract for letting such house shall, at the option of the lessor, become void; and such lessor shall thereupon have the like remedy to recover the possession, as against a tenant for holding over after the expiration of his term.<sup>3</sup>

When any tax on any real estate shall have been paid by, or collected from, any occupant or tenant, when there is some other person who, by agreement or otherwise, ought to pay such tax, or any part thereof, such occupant or tenant shall be entitled to recover by action the amount which such person should have

<sup>1</sup> Statutes G. p. 817.

<sup>2</sup> Id. 818.

<sup>3</sup> Id. 824.

paid, with interest thereon ; or he may retain the same out of any rent due or accruing from him to such person, for real estate on which such tax is so paid.<sup>1</sup>

## WASHINGTON.

From the statutes of this territory, it would seem necessary that all leases should be in writing, duly executed under seal before two witnesses, and acknowledged.

Upon levy and sale under execution, the sheriff may sell a seven years' lease of real estate.

An action to recover possession of real estate may be maintained against the tenant in possession ; or, if there is no such tenant, then against the person claiming the title, or some interest therein. The landlord may be substituted as defendant.<sup>2</sup>

## FORMS.

*Landlord's Agreement.*

This is to certify, that I, \_\_\_\_\_ have, this first day of May, 1859, let and rented unto James Smith, the house and premises known as No. 26 Clay street, in the city of San Francisco, and the sole and uninterrupted use and occupation thereof, for six months, to commence on the tenth inst., at the monthly rent of two hundred dollars, payable monthly in advance.

Given under my hand this 1st day of May, 1859.

GEORGE H. ENSIGN.

*Tenant's Agreement.*

This is to certify, that I, \_\_\_\_\_ have, this first day of May, 1859, hired and taken from George H. Ensign, the house and premises known as No. 26 Clay street, in the city of San Francisco, for six months, to commence on the tenth day of May, 1859, at the monthly rent of two hundred dollars, payable monthly, in advance. And I do hereby promise to make punctual payment of the rent in manner aforesaid. And I do further promise and agree to quit and surrender the premises at the expiration of the term in as good condition as reasonable use and wear thereof will permit, damages by the elements excepted. And I do hereby agree not to let or under-let the whole or any part of said premises, and that, in case of default in the pay-

<sup>1</sup> Statutes O. 445.

<sup>2</sup> Statutes W. Ter. 203.

ment of the rent above specified in manner aforesaid, or upon the expiration of the term above expressed, without requiring notice, or demand being made, it shall and may be lawful for said landlord, into and upon said demised premises, wholly to re-enter, and the same to have again, repossess and enjoy, as of the former estate, any thing herein contrary notwithstanding.

May 1st, 1859.

JAMES SMITH.

*Short Form of Lease.*

This indenture, made the first day of May, in the year one thousand eight hundred and fifty, between Joseph Hoyt, of the city and county of San Francisco and state of California, of the first part, and Philip Horn, of the same place, of the second part,

Witnesseth, that the said party of the first part hath letten, and by these presents doth grant, demise, and to farm let, unto the said party of the second part, all that, &c. [*here describe the premises intended to be let*], with the appurtenances, for the term of one year from this date, at the yearly rent of twelve hundred dollars, to be paid monthly in advance. And it is agreed that if any rent shall be due and unpaid, or if default shall be made in any of the covenants herein contained, then it shall be lawful for the said party of the first part to re-enter the said premises, and to remove all persons therefrom.

And the said party of the second part doth covenant to pay to the said party of the first part the said yearly rent as herein specified, namely, in monthly payments on the first day of each month of the said term: and that at the expiration of the said term, the said party of the second part will quit and surrender the premises hereby demised in as good state and condition as reasonable use and wear thereof will permit, damages by the elements excepted; and the said party of the first part doth covenant that the said party of the second part, on paying the said yearly rent, and performing the covenants aforesaid, shall and may peaceably and quietly have, hold, and enjoy, the said demised premises for the term aforesaid.

In witness whereof, we have hereunto set our hands and seals, this first day of May, one thousand eight hundred and fifty.

Sealed and delivered	}	JOSEPH HOYT. [L. s.]
in the presence of		PHILIP HORN. [L. s.]
JOHN JONES.		

*Indenture of Lease with Covenant to Build, &c.*

This indenture made the first day of November, A. D. one thousand eight hundred and fifty-eight, witnesseth, that Peter

O. Minor, of San José, county of Santa Clara, state of California, of the first part, doth hereby lease, demise, and to farm let unto E. B. Mastick, of the city and county of San Francisco and state aforesaid of the second part, the following lot of land situate in the said city and county of San Francisco, and described as follows, to wit: commencing [*here insert description*], together with all and singular the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining, to have and to hold the above-mentioned premises unto the said party of the second part, his executors, administrators, and assigns, from and after the day of the date hereof, for and during and until the full end and term of ten years thence next ensuing.

Yielding and paying therefor monthly at the end of every month during the continuance of the term hereby demised, unto the said party of the first part, his heirs and assigns, as rent, the sum of one hundred and fifty dollars, except as hereinafter stated.

And it is mutually covenanted and agreed by and between the parties to these presents, for themselves and their respective heirs, executors, administrators, and assigns, as follows: That said party of the second part shall well and truly pay the rent herein reserved at the times and in the manner herein provided; and also, that said party of the second part shall and will, at all times hereafter during the said term, pay and discharge all the taxes, assessments, charges and impositions whatever which may be laid, imposed or assessed upon the said premises, or any improvements made or to be made thereon; and also, that said party of the second part shall and will, within two years from the date of this lease, to be then complete, build, or cause to be built and erected, upon said premises, a good and substantial building or buildings, to cover the whole of the front on Montgomery street, of brick or stone materials, and with or without iron fronts, at the option of the said party of the second part—the lower or first story of said building and buildings to be arranged for stores, and leaving the upper stories or stories to be added at such time and for such uses, or to be entirely omitted, as may be determined by said party of the second part; and also, that at the expiration of five years from the date hereof, to wit: the first day of November, one thousand eight hundred and sixty-three (1863), or at any time thereafter during the term, it shall be at the option of said party of the first part to require said lot to be appraised and a new valuation of the rent thereof to be determined for the remainder of the term, and if the same be required each party shall choose a disinterested person, who shall be an owner of real estate in fee simple in San Francisco, to estimate the value of said land, and assess the just and proper monthly rent of said lot without its improvements; and in case said persons cannot agree upon

such valuation and assessment, they shall then choose an umpire, whose decision shall fix and determine the same, and shall bind all parties; and also, that said party of the second part shall not assign this lease to any person or persons whatever, except it be to some person of substantial and undoubted pecuniary responsibility, such assignee to succeed to and become held and bound by all the covenants hereof, and that in the event of an assignment the same shall not affect in any way the present liability of said party of the second part for and on account of the covenants herein contained; and also, that in case the said improvements shall be destroyed or materially damaged by fire or other casualty, it shall be at the option of said party of the first part to revoke, cancel and annul this lease, unless said party of the second part shall repair or rebuild like good and substantial buildings upon the premises; and also, that upon the determination of this lease the said party of the first part shall pay to said party of the second part the reasonable value of the improvements by him erected in accordance with the terms of this lease, and which shall be then remaining upon said premises, such valuation to be ascertained and determined by arbitration, in the manner hereinbefore provided for the determining the revaluation of the rent of said premises, said arbitration in either case to be at the mutual expense of both parties; and also, that if the said monthly payments of rent or any of them herein provided for should be behind-hand and remain unpaid for the period of fifteen days next after any of the days or times above mentioned for the payment thereof, or if the said party of the second part shall not well and faithfully observe, faithfully perform, and keep all and singular the covenants and agreements in these presents contained on the part and behalf of the party of the second part, to be observed, fulfilled, performed and kept according to the true intent and meaning thereof, then and from thenceforth it shall and may be lawful for said party of the first part to re-enter in and upon the said demised premises, or any part thereof, in the name of the whole, and to have again, repossess, and enjoy the same as in his first and former right and estate, and to expel from thence the said party of the second part, or any person or persons under, by, through, or from him, claiming or holding the same; and also, that the said party of the second part paying the rent as aforesaid, and performing all and singular the covenants and agreements herein contained by him to be paid and performed, shall quietly and peaceably have, use, occupy and enjoy all and singular the premises hereby demised, without any let, suit, hindrance or denial of the said party of the first part, or any other person or persons whatsoever, by, from, or under him lawfully claiming; and also, that at the expiration of said term the covenants herein contained being fully performed, said party of the second part

shall deliver up to said party of the first part the said premises and every part and parcel thereof, and all and singular the tenements, hereditaments and appurtenances without fraud or delay.

In witness whereof, the said parties have hereunto, and to another of like tenor and date, interchangeably set their hands and seals the day and year first above written.

*Lease with Covenants.*

This indenture, made this first day of June, in the year of our Lord one thousand eight hundred and fifty-nine, between William R. Satterlee, of San Francisco, of the first part, and Charles S. Capp, of the same place, of the second part, witnesseth, that the said party of the first part, in consideration of the rents, covenants and agreements hereinafter reserved and contained, by the said party of the second part, to be paid, kept and performed, has demised and let, and by these presents does demise and let, unto the said party of the second part, all that certain lot, piece or parcel of land [*here insert description*], to have and to hold, unto the said party of the second part for and during and until the full end and term of five years, commencing on the first day of January, one thousand eight hundred and sixty, and then next ensuing; yielding and paying therefor unto the said party of the first part, or his legal representatives, the yearly rent or sum of three thousand dollars, payable monthly in advance; that is to say, the sum of two hundred and fifty dollars to be paid on the first day of January next, and the like sum of two hundred and fifty dollars on the first day of each and every month thereafter, until the said term shall be fully complete and ended.

And the said party of the second part, in consideration of the premises, and of one dollar to him paid by the said party of the first part, the receipt whereof is hereby acknowledged, hereby covenants, promises and agrees to and with the said party of the first part, his heirs, executors, administrators and assigns, to take the said premises for the term aforesaid, and pay the said rent therefor at the times and in the manner hereinbefore specified for the payment thereof, and at the expiration of the said term to quit, surrender and yield up the said premises to the said party of the first part, or his legal representatives, in as good order and condition as reasonable use and wear thereof will permit (damages by the elements only excepted); and further, that if default be made in the payment of the said rent, or in any of the terms, covenants and conditions herein contained, by the said party of the second part to be kept and performed, then it shall be lawful and competent for the said party of the first part, or his legal representatives, at his or their option, without any legal process or warrant other than is herein contained, to re-enter upon and

take possession of the said premises, and the same to have again, repossess and enjoy, as in his first and former estate, but without thereby excluding him or them from the right to recover any other or further damages sustained by reason of such default.

And the said party of the second part further covenants and agrees as aforesaid, that he will not, during his occupancy of the said premises, place therein or thereon any property extra hazardous, so as to endanger the destruction of the said premises or any portion thereof, by fire; that the said party of the first part shall at all times during the said term, have the right to enter into and upon the said premises, for the purpose of examining the condition thereof; and that the said party of the second part shall and will not assign this lease, without the written consent of the said party of the first part, or his legal representatives.

In witness whereof, the said parties have hereunto set their hands and seals, the day and year first above written.

WM. R. SATTERLEE. [L. S.]  
CHAS. S. CAPP. [L. S.]

Sealed and delivered in pres- }  
ence of JOHN HANNA. }

*An Agreement for a Lease.*

Memorandum of an agreement entered into this twenty-third day of April, 1859, between Erwin Davis, of the city of San Francisco, and H. P. Coon, of said city, whereby the said Erwin Davis agrees, by indenture to be executed on or before the fifth day of June next, to demise and let to the said H. P. Coon, a certain house and lot in said city known as No. 151 Harrison street, to hold to the said H. P. Coon, his executors, administrators and assigns, from the fifth day of June aforesaid, for and during the term of twelve years, at the yearly rent of twelve hundred dollars, payable monthly one hundred dollars a month, in advance, clear of all taxes and deductions except the ground-rent. In which lease there shall be contained covenants on the part of the said H. P. Coon, his executors, administrators and assigns, to pay the rent (except in case the premises are destroyed by fire, the rent is to cease until they are rebuilt by the said Erwin Davis), and to pay all taxes and assessments (except the ground-rent); to repair the premises (except damages by fire); not to carry on any offensive or other business on the premises (except by written permission of said Erwin Davis); to deliver the same up at the end of the term in good repair (except damages by fire, as aforesaid); with all other usual and reasonable covenants, and a proviso for the re-entry of the said Erwin Davis, his heirs and assigns, in case of the non-payment of the rent for the space of three days after either of the said rent-days,



or the non-performance of any of the covenants. And there shall also be contained covenants on the part of the said Erwin Davis, his heirs and assigns, for quiet enjoyment; to renew said lease at the expiration of said term, for a further period of twelve years, on terms to be agreed upon; and that in case of an accidental fire at any time during the term, the said Erwin Davis will forthwith proceed to put the premises in as good repair as before such fire, the rent in the mean time to cease. And the said H. P. Coon hereby agrees to accept such lease on the terms aforesaid. And it is mutually agreed that the cost of this agreement, and of making and recording said lease and a counterpart thereof, shall be borne by the said parties equally.

As witness our hands and seals, the day and year first above written.

ERWIN DAVIS. [L. s.]  
H. P. COON. [L. s.]

*Surrender of Lease.*

This indenture, made the fifth day of May, A. D. 1860, between Frank Miller, of the city of San Francisco, of first the part, and William Fox and George Penn, late of said city, of the second part. Whereas the said parties of the second part, and one W. Melvin did, by their indenture of lease, dated December 1, 1858, recorded in liber No. 39 of leases, page 23, demise and to farm let unto the said party of the first part the lot therein described as follows [*insert description*], for the term of ten years from the date of said lease, with the privilege of an additional term of five years upon the conditions in said lease mentioned, and in an agreement dated August 9, A. D. 1859, and recorded in liber No. 20 of leases, page 129, contained and reserved, and with the privilege of purchase of the total at the end of the term; and whereas the interest of said Melvin in and to said lease has been transferred to said parties of the second part,

Now these presents witness, that for and in consideration of the sum of ten dollars to the said party of the first part in hand paid at the sealing and delivery of these presents by the said parties of the second part, and to the intent and purpose that the said term in the said land and premises may be wholly ended and extinguished, and the said privilege of purchase wholly discharged, and the improvements erected on said premises become the absolute property of the said parties of the second part, he, the said party of the first part, hath given, granted, and surrendered, and by these presents doth give, grant, and surrender, unto the said parties of the second part and their heirs, all the said lands and premises in the said indenture of lease contained and demised as aforesaid, and all the buildings and improvements erected thereon, and all the estate, right, title, interest, term and terms of years, privilege of purchase of said lands, property, claim, and demand

whatsoever of him, the said party hereto, of the first part, of, in, to, or out of the name, or any part or parcel thereof, to have and to hold the said lands and premises, buildings, and erections, to the said parties hereto of the second part, their heirs and assigns, and to their own proper use and behoof. And the said party of the first part doth hereby covenant that the same are free and clear of all incumbrances of what kind soever, at any time by him or by his consent or procurement done, committed, or suffered.

In witness whereof, the said party of the first part hath hereto set his hand and seal, the day and year first above written.

Sealed and delivered in }	FRANK MILLER. [L. s.]
presence of M. N. }	

*Notice to Quit, by the Landlord.*

To Wm. Beales :

Take notice, that you are hereby required to quit, and deliver up to me the possession of the premises now held and occupied by you, being the premises known as [*or situated*] [*description*], at the expiration of the month [*or week, or year, as may be*], of your monthly tenancy of said premises, commencing on the fifth day of April, 1859, and ending on the fifth day of May, 1859.

This is intended as a month's notice to quit, for the purpose of terminating your tenancy aforesaid.

GEORGE JENKINS.

April 4th, 1859.

*Demand for Possession under 13th Section of Detainer Act.*

To Peter Hall :

You are hereby notified and required, forthwith to deliver up to me the possession of the premises now occupied by you, under lease from me, situated [*here follows description*].

May 8th, 1859.

ANDREW WILKINS.

*Demand of Possession.*

To A. B. :

The sum of one hundred dollars rent of the premises occupied by you, under lease from the undersigned, C. D., and known as the Pioneer Race-Course, due January 1st, 1850, having remained unpaid until this date, you are hereby required to deliver possession to us of the said premises, within three days from this date.

C. D.

San Francisco,

A. D. .

*Notice of Quitting Premises by Tenant.*

To George Jenkins, Landlord:

Please take notice, that I shall quit possession, and deliver up the premises now held and occupied by me, being the premises [description], at the end of the next month of my monthly tenancy of said premises, to wit: on the fifth day of May, 1859, as I intend to remove therefrom, and to terminate the said tenancy.

April 4th, 1859.

Yours, &c., WM. BEALS.

*Summons in Detainer after Rent Due. (To be served by sheriff or constable—not by deputized person.)*

In the Justices' Court of the Second Township, in and for the City and County of San Francisco.

John Brown  
against  
William Jones. }

The People of the State of California to the Sheriff, or any constable of the city and county aforesaid:

Whereas, John Brown, of the said city and county of San Francisco, hath exhibited unto me, a justice of the peace for said county, a complaint against William Jones, of the city and county of San Francisco, for that, on or about the first day of March, A. D. 1859, John Brown, as landlord, leased and demised to William Jones, as tenant, by virtue of a parol lease, made on the day above named, the following described premises, to wit: all that lot of land situated in the city of San Francisco, and bounded and described [insert description].

To have and to hold, the said premises to the said tenant, &c., for the term of two months thence next ensuing, at the monthly rent of fifty dollars, payable monthly in advance; that by virtue of said lease said tenant went into possession of said premises, and he and others under him still continue to hold the same: that, according to the terms of said lease, there became due on or about the first day of April, A. D. 1859, the sum of fifty dollars, rent; that said sum still remains due and unpaid; that, on the day when the last instalment of said rent became due, demand was made therefor in due manner and form; that said instalment remains still due and unpaid; that three or more days after said instalment became due, and said demand was made, and three or more days before the commencing of this suit, demand was duly made in writing of the defendant, to deliver up the possession of said premises, which said defendant has hitherto wholly failed and refused to do: and the said John Brown claims the sum of fifty dollars for

damage to said property, in tearing down a good board fence surrounding the yard.

Wherefore, the plaintiff prays judgment for fifty dollars for waste and injury; also fifty dollars, rent due, as aforesaid, and restitution of the said premises.

You are therefore commanded to summon the said William Jones, if he can be found in your county, to be and appear before me, at my office, in said township, on the twentieth day of April, A. D. 1859, at 11 o'clock, A. M., then and there to make answer unto the complaint aforesaid.

Given under my hand and seal, this ninth day of April, A. D. 1859.

WM. CLARK, [L. s.]  
Justice of the Peace.

I certify the above to be a true copy of the original summons by me issued in the above-entitled cause.

WM. CLARK,  
Justice of the Peace.

*Complaint in Detainer after Rent due.*

In the Justices' Court, Second Township, in and for the City and County of San Francisco.

John Brown }  
against  
William Jones. }

City and County of San Francisco:

John Brown, the plaintiff in this suit, a resident of , by William Smart, his attorney, complains of William Jones, the defendant in this suit, a resident of , and for cause of complaint shows,

That, on or about the first day of March, A. D. 1859, John Brown, as landlord, leased and demised to William Jones, as tenant, by virtue of a certain lease made on the day above-named, the following described premises, situate in the said city and county, to wit: [*insert description.*]

To have and to hold the said premises to the said tenant, &c., for the term of two months thence next ensuing, at the monthly rent of fifty dollars, payable monthly in advance. That by virtue of said lease said tenant went into possession and occupation of said premises, and hath ever since held and occupied, and still doth continue to hold and occupy the same; that according to the terms of said lease [*here insert any covenant and the breach thereof, instead of the non-payment of rent, as the case may be*], there became due on the first day of April, A. D. 18 , the sum of fifty dollars, rent; that said sum still remains due and unpaid; that on that day when the said rent, to wit, \$ , became due, to wit, demand was made by the said plaintiff of said defendant therefor in due manner and form upon the premises,

but said defendant neglected and refused to pay the same, and said instalment remains still due and unpaid: that three or more days after said instalment became due and said demand was made, and three or more days before the commencing of this suit, to wit: on the ninth day of April, A. D. 1859, at said city and county, demand was duly made in writing of the defendant by the plaintiff, to deliver up the possession of said premises to the plaintiff, which said defendant refused to do, and has hitherto wholly failed and refused to do; and still doth neglect to do, and forcibly, wrongfully and unlawfully detains the possession of the said premises from the said plaintiff, whereby the said plaintiff hath sustained damages by reason of the said wrongful and unlawful detention and holding over, to the amount of one hundred dollars. And the said plaintiff further alleges that the said defendant has committed waste, in tearing down a good board fence surrounding the yard, to the damage of this plaintiff of fifty dollars.

Wherefore, the plaintiff prays judgment for one hundred and fifty dollars damages, for waste and injury, and for the detention of said premises; also fifty dollars, rent due, as aforesaid, and restitution of the said premises.

WILLIAM SMART, Plaintiff's Attorney.

City and County of San Francisco, ss:

John Brown, the plaintiff in the foregoing complaint named, being duly sworn, deposes and says, that he has read the foregoing complaint, and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated on his information and belief, and as to those matters he believes it to be true.

JOHN BROWN.

Sworn to before me, this ninth day of April, A. D. 1859.

WM. CLARK, Justice of the Peace.

### *Writ of Restitution.*

State of California, }  
City and County of San Francisco, } First Township.  
The People of the State of California to the Sheriff or any constable of the county aforesaid:

Whereas B. C., of the city and county of San Francisco, at a court of inquiry of an unlawful detainer, held at my office in the county aforesaid, on the \_\_\_\_\_ day of \_\_\_\_\_, A. D. 1859, before me, a justice of the peace for the county aforesaid, by the consideration of the court, hath recovered judgment against Y. Z., to have restitution of certain premises [*here insert description*], and that the said B. C. do have and recover of said Y. Z.

the sum of                      damages, and the sum of                      costs of  
this action.

You are therefore commanded that, taking with you the force of the county, if necessary, you cause the said Y. Z. to be immediately removed from the aforesaid premises, and the said B. C. to have peaceable restitution of the same.

And you are also commanded that of the goods and chattels of the said Y. Z., within said county, you cause to be made the sum of            dollars for the sum of the said plaintiff, together with the costs of suit endorsed thereon; and make return hereof, within thirty days from this date.

Given under my hand, this                      day of                      , A. D.  
1859.                      O. P., Justice of the Peace.

## CHAPTER XXVII.

## LIEN OF MECHANICS AND OTHERS.

## STATUTORY PROVISIONS.

IN view of the general application of the law of lien, the act of 1856 as amended by the act of 1858, is here given almost entire; attention being first called to the supplementary act of 1857, which provides that the provisions of the act for "Securing Liens to Mechanics and others," is extended, so as to include in its provisions, bridges, ditches, flumes or aqueducts, to create hydraulic power, or for mining purposes; and all master builders, mechanics, lumber merchants, contractors, journeymen or laborers, and all other persons performing labor, or furnishing materials for, or employed in the construction or repair of any bridge, ditch, flume or aqueduct aforesaid, shall have the same lien, subject to the same provisions and regulations, as in and by said act are provided for liens upon buildings, wharves, and other superstructures.

## ACT OF APRIL 19, 1856, FOR SECURING LIENS TO MECHANICS AND OTHERS.

SECTION 1. All artisans, builders, mechanics, lumber merchants, and all other persons performing labor or furnishing materials for the construction or repairing of any building, wharf or other superstructure, for the work and labor done or materials furnished by each respectively.

SEC. 2. Every person wishing to avail himself of the benefits of this act, shall file in the recorder's office of the county in which such building, wharf or superstructure is situated, within sixty days after the completion of such building, wharf or superstructure, a just and true account of the demands due him, after deducting all proper credits and offsets, and shall verify said account by his own oath, or the oath of some other person, and shall also file, at the same time, a correct description of the

property to be charged with said lien. If such lien is claimed by a subcontractor, journeyman, or any other person except the contractor performing labor or furnishing materials, the account aforesaid shall be filed within thirty days after the work was done or the materials were furnished by him ; and within five days after the filing of said account as aforesaid, he shall serve a copy thereof on the owner or owners of such building, wharf or superstructure, or the agent of such owners, if the latter reside out of the county in which such building, wharf or superstructure is situate, by delivering the same to him personally, or by leaving it at his usual place of residence, with a person of suitable age and discretion, or by depositing it in the post-office, directed to him at his usual place of business. If such owner do not reside within the county, and have no agent therein, service of the copy aforesaid may be made by posting the same in a conspicuous place on the building, wharf or superstructure to be charged with such lien.

Sec. 3. Every subcontractor, journeyman, laborer or other person, performing labor or furnishing materials, shall, under the provisions of this act, have a valid lien upon the building, wharf or superstructure on which such labor was performed, or for which such materials were furnished, regardless of the claims of the contractor against the owner of such building, wharf or superstructure ; but if any money be due, or is to become due, under the contract from said owner to said contractor, on being served with a notice by a subcontractor, as provided in the last preceding section, said owner may withhold, out of the first money due, or to become due under the contract, a sufficient sum to cover the lien claimed by such subcontractor, journeyman, laborer, or other person performing labor or furnishing materials, until the validity thereof shall be ascertained by a proper legal proceeding, if the same be contested ; and if so established, the amount thereof shall be a valid offset to that extent in favor of the owner against the contractor. But no attachment served on the funds in the hands of the owner of such building, wharf or superstructure, for claims other than those expressed in this act, shall lie against the liens created by this act, nor shall such owner be held or legally bound to answer such attachment until all claims under the contract or liens by this act shall first be satisfied.



SEC. 4. The land upon which any building or superstructure shall be erected, together with a convenient space around the same, or so much as may be required for the convenient use and occupation of the premises, shall also be subject to the lien created by this act, if, at the time the labor was commenced or the first of the materials were finished, the land belonged to the person who caused the said building, wharf, or superstructure to be erected, but if such person owned less than a fee-simple estate in such land, then only his interest therein shall be subject to such lien, and the liens created by this act shall be preferred to every other lien or incumbrance which shall have attached upon the said property subsequent to the time at which the work was commenced or the materials furnished; and also, to all mortgages and other incumbrances unrecorded at the time such work was commenced, or the first of such materials were furnished, but nothing herein contained shall be construed as impairing any valid incumbrance upon the said land duly made and recorded before such work was commenced, or the first of such materials were furnished.

SEC. 5. The amount required to be filed by the second section of this act, shall specify that it is the intention of the holder thereof to claim a lien upon the premises sought to be charged therewith; and it shall be the duty of the recorder to file and record such notice and account in a separate book provided for the purpose, and from the time of such filing, all persons shall be deemed to have notice thereof.

SEC. 6. No such lien shall bind any building, wharf, or superstructure for a longer period than six months after filing the same, unless suit be brought in a proper court within that time to enforce the same; or, if a credit be given, then within six months after the expiration of the credit; but no lien shall be continued in force for a longer time than two years from the time the work is completed or the materials furnished, by any agreement to give credit.

SEC. 7. Said liens may be enforced by suit in a court of competent jurisdiction, on setting forth in the complaint the particulars of such demand, with a description of the premises sought to be charged with said lien; and at the time of filing the complaint and issuing summons, the plaintiff shall cause a notice to be published for at least twenty days, in some newspaper pub-

lished in the county, if there be one, and if not, then in such mode as the court shall direct, notifying all persons holding or claiming liens, under the provisions of this act, on said premises, to be and appear in said court on a day therein specified, and to exhibit then and there the proof of said liens. On the day appointed, the court shall proceed to hear and determine the said claims in a summary way, or may refer the same to a referee to ascertain and report upon said liens, and the amount justly due thereon; and all liens not so exhibited and proved shall be deemed to be waived in favor of those which are so exhibited. On ascertaining the whole amount of said liens with which the said premises are justly chargeable as hereinbefore provided, the court shall cause said premises to be sold in satisfaction of said liens, and the costs of suit; and if the proceeds of such sale shall not be sufficient to satisfy the whole of such liens established as aforesaid, then the same shall be apportioned according to the respective rights of the several parties.

SEC. 8. Nothing herein contained shall be construed to take away, or affect in any manner, any action which any such contractor, laborer, subcontractor, or other person performing labor or furnishing materials for such building, wharf, or superstructure would otherwise have against his employer.

SEC. 9. The holder of such lien, filed as aforesaid, on payment thereof, shall enter satisfaction of the same of record, at the request of any one interested in the property charged with the lien, within ten days after such request, on the payment of the costs of such entry; and, on failure to enter such satisfaction, shall forfeit and pay the party aggrieved the sum of fifty dollars per day until such satisfaction shall be entered, to be recovered in the same manner as other debts are recovered.

SEC. 10. Any mechanic or artisan who shall make, alter, or repair any article of personal property, at the request of the owner or legal possessor of such property, shall have a lien on such property so made, altered, or repaired, for his just and reasonable charges for his work done and materials furnished, and may hold and retain possession of the same until such just and reasonable charges shall be paid; and if not paid for within the space of two months after the work shall be done, such mechanic or artisan may proceed to sell the property by him so made, altered,

or repaired, at public auction, by giving three weeks' public notice of such sale, by advertisement in some newspaper published in the county in which the work may be done; or, if there is no such newspaper, then by posting up notices of such sale in three of the most public places in the town where such work was done; and the proceeds of said sale shall be applied, first, to the discharge of such lien and the costs and expenses of keeping and selling such property, and the remainder, if any, shall be paid over to the owner thereof.

SEC. 11. Nothing contained in this act shall be deemed to apply to or affect any lien heretofore acquired, and an act entitled "An Act to provide for the Lien of Mechanics and others," passed April twelve, one thousand eight hundred and fifty, and all other acts inconsistent with the provisions of this act are hereby repealed.

SEC. 12. When any person shall make an express contract in writing with the owner of any lot or lots, in any incorporated city or town, to grade or improve the same, or the street in front of and adjoining the same, and shall go on and complete the said grading or improving of said lot or street adjoining the same, it shall be considered as an improvement upon said lot or lots, and the same provisions of this act shall apply thereto as would apply if it were a building erected on the said lot or lots.

SEC. 13. When any person shall make an express contract, in writing, with the owner or owners of any lot or lots, in any incorporated city or town, or with the person who was, at the time of such contract, and had been for more than one year the next preceding, in the actual possession of such lot or lots, by himself or themselves, or tenant or tenants, under *bona fide* claim of ownership, to grade, fill in, build upon, or otherwise improve the same, and shall go on and complete such grading, filling, building, or other useful improvement, he shall have a lien upon such lot or lots for the amount contracted to be paid; and all the provisions of this act respecting the mode of recording, securing, and enforcing mechanics' liens, shall apply thereto. When the amount of the debt sought to be secured by lien is not over two hundred dollars, the action should be brought in a justice's court. If, however, the amount of all the liens brought in should exceed two hundred dollars, the justice would lose jurisdiction.

## JUDICIAL DECISIONS.

The evident intention of the act in relation to mechanics' liens, was to give mechanics and artisans a lien for all work done by them, upon any description of property. The first section gives a lien upon the superstructure itself, as distinct from the land; and the fourth section gives a lien also upon the land, when the same is owned by the person who caused the superstructure to be erected.<sup>1</sup>

The object of the act was to give the mechanic a lien upon whatever interest the person who caused the superstructure had, and which could be sold under execution.<sup>1</sup>

The lien of a subcontractor filed, and notice given to the owner of a building within thirty days after the completion of a work, under the act of 1855, attaches from the time the work was commenced, and takes precedence over a garnishment served on the owner against the head contractor, after the work was commenced, and before the filing and serving notice of lien.<sup>2</sup>

Where a civil engineer's lien for work done for the defendants in the construction of a canal or ditch, was filed in the recorder's office of the county where the ditch is located, on the 6th day of May, 1856, and suit was not commenced to enforce the lien until the 26th day of January, 1857: *held*, that the time fixed by statute for the enforcement of the lien had expired before the commencement of the suit, and that the plaintiff was not entitled to a judgment giving a lien upon the property.<sup>3</sup>

A decree for the sale of premises in a suit to enforce a mechanic's lien, has the same and no greater effect upon the rights of purchasers and incumbrancers, prior to the commencement of the suit, than a similar decree would have upon the foreclosure of a mortgage. If such purchasers or incumbrancers are not made parties, they are not bound by the decree or the proceedings thereunder.<sup>4</sup>

The liens, which by the act of April 19th, 1856, entitled "An Act for Securing Liens to Mechanics and Others," are required to be exhibited and proved, upon publication of notice in some

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<sup>1</sup> 9 Cal. 119.  
<sup>2</sup> 7 Id. 858.

<sup>3</sup> 10 Id. 874.  
<sup>4</sup> Id. 547.

newspaper of the county, or be deemed waived, are liens arising under that act, and do not apply to other liens.<sup>1</sup>

## OREGON.

By the statute of *Oregon*, a lien is given where the amount exceeds twenty dollars for labor or materials, or machinery furnished in the construction or repair of a building, provided the claimant file notice of his intention to hold such lien in the county recorder's office, within three months after the completion of such building or repairs, the notice to specifically set forth the amount due or to become due, and a description of the building.<sup>2</sup>

Such lien expires in one year, unless suit be brought in the District Court to establish the same. If there be several persons having liens upon the same building and lot of ground, they may all join in one action, stating their claims separately; and upon a sale on execution, the proceeds are appropriated to pay *pro rata* all the liens of this character. Such execution may extend to other property of the defendant, where that covered by the liens is insufficient. These liens have preference over any other liens created after the commencement of the work.<sup>3</sup>

Any subcontractor, journeyman or laborer employed in constructing, repairing or furnishing materials or machinery for a building, may hold the owner liable to the extent of his indebtedness to the employer, by giving him written notice thereof, particularly setting forth the amount of his claim and the service rendered, which may be enforced by suit within one year.<sup>4</sup>

Any person making, altering or repairing, or bestowing labor upon, or carrying, conveying or transporting, or keeping or storing, any article of personal property, or pasturing, feeding, or bestowing any labor, care or attention upon any live stock, at request of the owner or any lawful possessor thereof, has a lien upon the same for his just charges, and may retain possession until he is paid.<sup>5</sup>

If he be not paid for three months, he may proceed to sell the property at public auction, or enough to pay his claim, with costs

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<sup>1</sup> 10 Cal. 547.

<sup>2</sup> *Id.* 178.

<sup>3</sup> *Laws Oreg.* p. 169.

<sup>4</sup> *Id.* 171.

and expenses; upon giving three weeks' previous notice, in some newspaper of the county, or, if there be no paper published, by posting the notice in three of the most public places in the city or township.

This right to retain and sell cannot interfere with any special agreement of the parties.

#### WASHINGTON.

Lien is given to the laborer or material-man, as in Oregon, upon the building, and the owner's interest in the land, when the claim exceeds fifty dollars. Notice of his intention to hold the lien must, in like manner, be recorded in the recorder's office within sixty days. A subcontractor, journeyman or laborer may hold the owner responsible, by giving him notice, to the extent of his indebtedness. And any lien may be enforced by suit in the District Court, brought within a year.<sup>1</sup>

Several claimants may unite in one action, or where there are several actions the court may order them to be consolidated. Upon sale of the property the proceeds apply to all the liens, and if insufficient, other property of the defendant may be levied upon. The defendant, on such suit or suits, may release the property from the lien or liens, by giving a bond, with surety duly approved.<sup>2</sup>

The lien upon personal property for making, repairing, or other labor, or for carrying, or for pasturing, keeping or attending to live stock, is given and regulated the same as in Oregon, except that notice of sale is given by posting a written notice, for at least ten days, in three public places in the county, precinct, town or city where the claimant resides, one of which shall be in some conspicuous part of his shop or place of business; or, if the value of the article be fifty dollars or more, by publishing the notice for three weeks successively, in a newspaper in the county, if there be any, in addition to posting.<sup>3</sup>

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<sup>1</sup> Laws Wash. 302.

<sup>2</sup> *Id.* 303.

<sup>3</sup> *Id.* 304.

## FORMS.

*Notice of Mechanics' Lien.*

Know all men by these presents, that under an agreement with \_\_\_\_\_, the owners of the premises hereinafter described, we, the undersigned, \_\_\_\_\_, have performed labor and furnished materials in and about a certain building on \_\_\_\_\_ street, side, in the city of \_\_\_\_\_, situated on lot No. \_\_\_\_\_. That such materials were furnished and labor performed less than sixty days previous to the date of this instrument.

That the amount due thereof, and for which the undersigned claim a lien, is the sum of \_\_\_\_\_, over and above all payment and set-offa.

We, the said \_\_\_\_\_, do hereby make known our intention to hold a lien upon the above-described premises, being the building aforesaid, together with the land upon which the same is erected, and the space around the same not exceeding \_\_\_\_\_ square feet clear of the building, for the said sum of \_\_\_\_\_, together with the interest thereon, pursuant to the provisions of an act of the legislature of the state of California, entitled, "An Act, &c." \_\_\_\_\_ A. B.

Dated San Francisco, June 29th, 1859.

C. D. &c.

*Another Form.*

State of California, }  
City and County of San Francisco. }

A. B. }  
against }  
C. D. }

Know all men by these presents, that I, A. B., of the city of San Francisco, in said county, have performed labor and furnished materials for the construction of the building erected, and now being upon the land and premises hereinafter more particularly described, as a contractor.

That it is my desire to avail myself of the benefits of the act of the legislature of the state of California, entitled "An Act for securing Liens of Mechanics and others," passed April 27, 1855, and the act of the legislature of the state of California, entitled "An Act for securing Liens to Mechanics and others," passed April 19, 1856; and the act to amend an act entitled "An Act for securing Liens to Mechanics and others," passed April 19, 1856; approved April 22, 1858; and that it is my intention to claim a lien upon the premises aforesaid and hereinafter described; and that it is my intention to claim and hold such lien, not only upon the said buildings, erections and superstructures,

but also upon the land upon which the same are erected; together with a convenient space around the same, or so much as may be required for the convenient use and occupation of the premises; or upon such interest as the said C. D., who caused the said building or superstructure to be erected, had on the first day of May, 1859, when the same was commenced, or at any time since hitherto.

That sixty days have not elapsed since the completion of such building or superstructure.

That the following is a correct description of the property to be charged with said lien: [*here give the description.*]

That the following is a just and true account of the demand due to the claimant, after deducting all proper credits and offsets:

DEBITS.			
Contract price of building and materials	-	-	\$5,000 00
Extra materials ordered	-	-	1,000 00
Total amount of debits,			\$6,000 00
DEDUCTIONS.			
Cash at sundry times	-	-	\$4,000 00
Deduction for injury to marble mantel piece	-	-	100 00
Total amount of deductions			4,100 00
Balance now due			\$1,900 00

City and County of San Francisco, ss.

A. B., the claimant in the within notice of intention to hold a lien named, and who subscribes the same, being duly sworn, says that he has read the same and knows the contents thereof, and that the same is in all respects just and true, and contains a just and true account of the demand due him, after deducting all proper credits and offsets.

A. B.

Sworn to before me this 15th day }  
of September, A. D. 1859. }

[L. S.]

W. D. W. WIGGINS, Notary Public.



*Notice of Intention to Hold Lien.*

A. B. }  
*against* }  
 C. D. }

City and County of San Francisco, ss:

Notice is hereby given to all whom it may concern, that I have furnished certain materials and performed labor in and about the same, for and which were used in the construction and erection of a certain building erected on lands in the city and county of San Francisco, which lands are reported to belong to one C. D. [*or*, to one D., husband of said C. D., *or*, to the said C. D. and her husband jointly]. That such materials were furnished and labor performed at the instance and request of one E. F., the contractor of said building, or of some part or portion thereof. The said building is situated on the lot described as follows: [*description.*]

And notice is also given, that I intend to hold a lien on said building, and the lot whereon the same is situated, and all the interest of the said reputed owners therein, for the amount which is hereunder written, and is for the value of the said material and labor, and amounts to the sum of fifty-seven dollars and forty-one cents, and that the said materials were furnished and labor performed within thirty days last past.

The following is a copy of the account above referred to, &c., &c., [*as in foregoing.*]

*Notice to Lien Men.*

Justices' Court, Second Township,  
 State of California, }  
 City and County of San Francisco. }

A. B. }  
*against* }  
 C. D. }

Notice is hereby given to all persons holding or claiming liens on that certain lot of land, with the building thereon, situated in the city of San Francisco, and described as follows: [*here insert description,*] to be and appear before me at my court-room, No. 101 Merchant street, on the 20th day of June, A. D. 1859, at ten o'clock in the forenoon of that day, and then and there exhibit the proof of said liens.

Dated this 25th day of May, A. D. 1859.

JAMES BRADFORD, Justice of the Peace.

*Order of Reference to ascertain and compute Liens, &c.*

Peter Don <i>against</i> M. W. Sig, John L. Brown, and E. P. Hawks, partners, &c.	}	District Court, Twelfth Judicial District.
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In the above-entitled cause, the plaintiff having proved to the satisfaction of the court that he had caused to be published for at least twenty days prior to the 12th day of March, 1859, in the *San Francisco Herald*, a daily newspaper published in the city and county of San Francisco, a notice as required by law, notifying all persons holding or claiming liens under the provisions of the act of the legislature of the state of California, entitled "An Act for Securing Liens to Mechanics and others, passed April 19th, 1856," and an act amendatory thereof, approved April 22d, 1858, entitled "An Act to amend an Act entitled an Act for Securing Liens to Mechanics and others," passed April 19th, 1856, upon the premises described in the plaintiff's complaint, to be and appear in this court on the twelfth day of March, 1859, at ten o'clock A. M. of the said day, and during the regular term of said court, and to exhibit then and there the proof of said liens; and it appearing to the court that the plaintiff hath in all things complied with the law and the provisions of the statute in respect to said notice; and it further appearing that on the said 12th day of March, the following-named persons appeared in said court and claimed a lien on said premises, and offered to establish the same by proof, to wit:

J. Johnson, Peter Williams, &c., &c.

And no other persons than those last above-named having appeared in pursuance of said notice, and claimed or exhibited proofs of their liens on said premises or any part thereof, it is adjudged, ordered and decreed that all liens not so exhibited on the said 12th day of March, 1859, shall be and the same are hereby adjudged and deemed to be waived in favor of those which were so exhibited.

And it is further ordered that this cause and the issues therein and the liens or claims of lien so exhibited on the said 12th day of March as aforesaid, be referred to John B. Harmon, to ascertain and report upon said liens and the amount justly due thereon, and upon the issues in this cause.

## CHAPTER XXVIII.

## MAGISTRATE.

## STATUTORY PROVISIONS.

A MAGISTRATE is an officer having power to issue a warrant for the arrest of a person charged with a public offence. The following persons are magistrates: justices of the Supreme Court, district and county judges, justices of the peace, recorders of cities, and mayors of cities, upon whom are conferred by law the powers of justices of the peace.<sup>1</sup>

A coroner may also issue a warrant into one or more counties, for the arrest of a person found by an inquisition to have caused the death of another by criminal means.<sup>2</sup>

A justice of the Supreme Court, a district judge, or county judge, may issue his warrant of arrest to any peace officer in the state. But any other magistrate can only issue his warrant to be served without the limits of his county, when his official character is certified by the county clerk of his county, or his handwriting is proved by affidavit endorsed on or annexed to the warrant, and some magistrate of the other county shall endorse upon the warrant an order that the warrant be executed in such other county.<sup>3</sup>

The warrant is issued upon the complaint of the prosecutor under oath, and the depositions of any witnesses he may produce.<sup>4</sup>

Upon being arrested, the defendant must, in all cases, be taken before the proper magistrate without delay.<sup>5</sup>

If a public offence be committed in the presence of a magistrate, he may, by a verbal order, command any person to arrest the offender, and may thereupon proceed as if the offender had been brought before him on a warrant of arrest.<sup>6</sup>

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<sup>1</sup> Wood's Dig. art. 1446.

<sup>2</sup> Id. 487.

<sup>3</sup> Id. 1461.

<sup>4</sup> Id. 1447, 1448.

<sup>5</sup> Id. 1456, 1468, 1472.

<sup>6</sup> Id. 1466.

Arrest may also be made without a warrant by a peace officer\* or by a private person: 1. For a public offence committed or attempted in his presence; 2. When the person arrested has committed a felony, although not in his presence; 3. When a felony has been in fact committed, and he has reasonable cause for believing the person arrested to have committed it; and 4th. By a peace officer only, on a charge made upon a reasonable cause, of the commission of a felony by the party arrested. A peace officer may also at night, without a warrant, arrest any person whom he has reasonable cause for believing to have committed a felony.<sup>1</sup>

The person must be informed of the cause of the arrest and the authority of the officer, except when he is in the actual commission of the offence, or is arrested on pursuit immediately after the act, or after an escape.<sup>2</sup>

When a defendant is arrested for a felony† he must be brought before the magistrate who issues the warrant, or in case of his absence or disability, the nearest or most accessible magistrate of the same county; except in the case when the warrant is issued in the county where the defendant is found, upon an offence triable in another county, the defendant must be taken to that county.<sup>3</sup>

When arrested for a misdemeanor,† however, the defendant is entitled to be admitted to bail in the county where arrested.<sup>4</sup>

The proceedings to be had upon the examination of the defendant are fully contained in the following sections of the act in relation to proceedings in criminal cases quoted from Wood's Digest of California Laws, from section 146, page 281, to section 176, page 284.

SEC. 146. When the defendant is brought before the magistrate upon an arrest, either with or without warrant, on a charge of having committed a public offence, the magistrate shall immediately inform him of the charge against him, and of his right to the aid of counsel in every stage of the proceedings, and before any further proceedings are had.

\* Peace officers are sheriffs of counties, and constables, marshals, and policemen of cities and towns respectively.

† A felony is a public offence, punishable with death or by imprisonment in a state prison. Every other public offence is a misdemeanor.

<sup>1</sup> Wood's Dig art. 1 '64-1474.

<sup>2</sup> Id. 1467 and 1470.

<sup>3</sup> Id. 1432, 1435-1436.

<sup>4</sup> Id. 1438, 1451, 1458.

SEC. 147. He shall also allow the defendant a reasonable time to send for counsel, and adjourn the examination for that purpose, and shall, upon the request of the defendant, require a peace officer to take a message to such counsel within the township or city as the defendant may name. The officers shall, without delay and without fee, perform that duty.

SEC. 148. The magistrate shall immediately after the appearance of counsel, or if defendant require the aid of counsel after waiting a reasonable time therefor, proceed to examine the case.

SEC. 149. The examination must be completed at one session, unless the magistrate for good cause shown adjourn it. The adjournment cannot be for more than two days at each time, nor more than six days in all, unless by consent or on motion of the defendant.

SEC. 150. If an adjournment be had for any cause, the magistrate shall commit the defendant for examination, admit him to bail or discharge him from custody upon the deposit of money as provided in this act, as security for his appearance at the time to which the examination is adjourned.

SEC. 151. The commitment for examination shall be by an endorsement signed by the magistrate on the warrant of arrest to the following effect: "The within-named, A. B., having been brought before me under this warrant, is committed for examination to the sheriff of the county of . . . ." If the sheriff be not present, the defendant may be committed to the custody of a peace officer.

SEC. 152. At the examination the magistrate shall in the first place read to the defendant the depositions of the witnesses examined on the taking of the information. He shall also issue subpoenas for any witnesses required by the prosecutor or the defendant, as provided in section five hundred and forty-eight.

SEC. 153. The witnesses shall be examined in the presence of the defendant, and may be cross-examined in his behalf.

SEC. 154. When the examination of witnesses on the part of the people is closed, the magistrate shall distinctly inform the defendant that it is his right to make a statement in relation to the charge against him (stating to him the nature thereof), that the statement is designed to enable him, if he see fit, to answer the charge and to explain the facts alleged against him, that he

is at liberty to waive making a statement, and that his waiver cannot be used against him on the trial.

SEC. 155. If the defendant waive his right to make a statement, the magistrate shall make a note thereof immediately following the depositions of the witnesses against the defendant, but the fact of his waiver shall not be used against the defendant on the trial.

SEC. 156. If the defendant choose to make a statement, the magistrate shall proceed to take the same in writing without oath, and shall put to the defendant the following questions only: "What is your name and age? Where were you born? Where do you reside, and how long have you resided there? What is your business or profession? Give any explanation you may think proper of the circumstances appearing in the testimony against you, and state any facts which you think will tend to your exculpation."

SEC. 157. The answer of the defendant to each of the questions must be distinctly read to him as it is taken down. He may thereupon correct, or add to his answer, and it shall be corrected until it is made conformable to what he declares to be the truth.

SEC. 158. The statement must be reduced to writing by the magistrate, or under his direction, and authenticated in the following form: 1. It must set forth in detail that the defendant was informed of his rights as provided by section one hundred and fifty-four, and that after being so informed he made the statement. 2. It must contain the questions put to him, and his answers thereto, as provided in sections one hundred and fifty-seven and one hundred and fifty-six. 3. It may be signed by the defendant, or he may refuse to sign it; but if he refuse to sign it, his reason therefor must be stated as he gives it. 4. It must be signed and certified by the magistrate.

SEC. 159. After the waiver of the defendant to make a statement, or after he has made it, his witnesses, if he produce any, shall be sworn and examined.

SEC. 160. The witnesses produced on the part either of the people or of the defendant, shall not be present at the examination of the defendant, and while a witness is under examination, the magistrate may exclude all witnesses who have not been examined. He may also cause the witnesses to be kept separate,

and to be prevented from conversing with each other until they are all examined.

SEC. 161. The magistrate shall also, upon the request of the defendant, exclude from the examination every person except his clerk, the prosecutor and his counsel, the attorney-general, the district attorney of the county, the defendant and his counsel, and the officer having the defendant in custody.

[SEC. 162, repealed by act of May 5, 1855.]

SEC. 163. After hearing the proofs and the statement of the defendant, if he have made one, if it appear either that a public offence has not been committed, or there is no sufficient cause to believe the defendant guilty thereof, the magistrate shall order the defendant to be discharged, by an endorsement on the depositions and statement signed by him, to the following effect: "There being no sufficient cause to believe the within-named A. B. guilty of the offence within mentioned, I order him to be discharged."

SEC. 164. If, however, it appear from the examination that a public offence has been committed, and that there is sufficient cause to believe the defendant guilty thereof, the magistrate shall in like manner endorse on the depositions and statement an order signed by him, to the following effect: "It appearing to me by the within depositions [and statement if any] that the offence therein mentioned [or any other offence, according to the fact, stating generally the nature thereof] has been committed, and that there is sufficient cause to believe the within-named A. B. guilty thereof, I order that he be held to answer the same."

SEC. 165. If the offence be not bailable, the following words, or words to the same effect, shall be added to the endorsement: "And that he be committed to the sheriff of the county of ."

SEC. 166. If the offence be bailable and bail be taken by the magistrate, the following words, or words to the same effect, shall be added to the endorsement: "And I have admitted him to bail to answer by the recognizance hereto annexed."

SEC. 167. If the offence be bailable and the defendant be admitted to bail, but bail have not been taken, the following words, or words to the same effect, shall be added to the endorsement mentioned in section one hundred and sixty-four: "And that he be admitted to bail, in the sum of                      dollars, and be com-

mitted to the sheriff of the county of \_\_\_\_\_, until he gives such bail."

SEC. 168. If the magistrate order the defendant to be committed, as provided in sections one hundred and sixty-five and one hundred and sixty-seven, he shall make out a commitment, signed by him, with his name of office, and deliver it, with the defendant, to the officer to whom he is committed, or, if that officer be not present, to a peace officer, who shall deliver the defendant into the proper custody, together with the commitment.

SEC. 169. The commitment must be to the following effect : [see *Forms.*]

SEC. 170. On holding the defendant to answer, the magistrate shall take from each of the material witnesses examined before him, on the part of the people, a written recognizance, to the effect that he will appear and testify at the court to which the depositions and statements are to be sent, or that he will forfeit the sum of five hundred dollars.

SEC. 171. Whenever the magistrate shall be satisfied by proof, on oath, that there is reason to believe that any such witness will not fulfil his recognizance to appear and testify, unless security be required, he may order the witness to enter into a written recognizance, with such sureties and in such sum as he may deem meet, for his appearance, as specified in the last section.

SEC. 172. Infants and married women, who are material witnesses against the defendant, may in like manner be required to procure sureties for their appearance, as provided in the last section.

SEC. 173. If a witness, required to enter into recognizance to appear and testify, either with or without sureties, refuse compliance with the order for that purpose, the magistrate shall commit him to prison until he comply or be legally discharged.

SEC. 174. When, however, it shall satisfactorily appear by the examination on oath of the witness, or any other person, that the witness is unable to procure sureties, he may be forthwith conditionally examined on behalf of the people; such examination shall be by question and answer, and shall be conducted in the same manner as the examination before a committing magistrate is required by this act to be conducted, and the witness shall thereupon be discharged.



SEC. 175. The last section shall not apply to the prosecutor or to an accomplice in the commission of the offence charged.

SEC. 176. When a magistrate has discharged a defendant, or has held him to answer, as provided in sections one hundred and sixty-four and one hundred and sixty-five, he shall return without delay to the clerk of the court at which the defendant is required to appear, the warrant, if any, the depositions, the statement of the defendant, if he have made one, and all recognizance of bail or for the appearance of witnesses, taken by him.

Magistrates, including justices of the peace, are required to aid in preserving the public peace, and in suppressing riots.<sup>1</sup>

If two or more persons assemble for the purpose of disturbing the public peace or committing any unlawful act, and do not disperse on being desired or commanded so to do by a judge, justice of the peace, sheriff, coroner, constable, or other public officer, the persons so offending shall, on conviction, be severally fined, in any sum not exceeding five hundred dollars, and imprisoned in the county jail not more than six months.<sup>2</sup>

If a magistrate or officer, having notice of an unlawful or riotous assembly, as provided in section forty, neglect to proceed to the place of assembly, or as near thereto as he can with safety, and to exercise the authority with which he is invested for suppressing the same, and arresting the offenders, he shall be deemed guilty of a misdemeanor.<sup>3</sup>

If the persons so assembled and commanded to disperse do not immediately disperse, any two of the magistrates or officers before mentioned may command the aid of a sufficient number of persons, and may proceed in such manner as in their judgment is necessary, to disperse the assembly and arrest the offenders.<sup>4</sup>

Every male person above eighteen years of age who shall neglect or refuse to join the *posse comitatus*, or power of the county, by neglecting or refusing to aid and assist in taking or arresting any person or persons against whom there may be issued any process, or by neglecting to aid and assist in retaking any person or persons who, after being arrested or confined, may have escaped from such arrest or imprisonment, or by neglecting or refusing to aid and assist in preventing any breach of the peace,

<sup>1</sup> Wood's Dig. art. 1404-1417.

<sup>2</sup> Id. 1411, 1412.

<sup>3</sup> Id. 1374.

or the commission of any criminal offence, being thereto lawfully required by any sheriff, deputy sheriff, coroner, constable, judge, or justice of the peace, or other officer concerned in the administration of justice, shall, upon conviction, be fined in any sum not less than fifty nor more than one thousand dollars.<sup>1</sup>

If any judge, justice of the peace, sheriff, or other officer, bound to preserve the public peace, shall have knowledge of an intention on the part of any two persons to fight with any deadly weapon or weapons, and such officer shall not use and exert his official authority to arrest the parties and prevent the deed, every such officer shall be fined in a sum not exceeding one thousand dollars.<sup>2</sup>

If complaint under oath, in proper form, be made to a magistrate, from which it appears that there is just reason to fear the commission of an offence threatened against the person or property of another, he shall cause such person to be arrested and brought before him, and a full examination had. If it appear that there is just reason to fear the commission of the offence alleged, the party may be required to give bond not exceeding five thousand dollars, with one or more sufficient sureties, to keep the peace toward the people of the state of California, and particularly toward the complainant, which bond shall be valid for six months, and may, upon removal of the complaint, be extended for a longer period, or a new bond may be required. If such bond be not given the magistrate shall commit the party to prison. The bond must be filed by the magistrate in the office of the clerk of the county.<sup>3</sup>

The powers of a magistrate in a criminal matter may be exercised on Sundays and other non-judicial days.<sup>4</sup>

#### FORMS.

##### *Complaint to obtain Surety of the Peace.*

State of California, }  
County of                } Justices' Court.

Personally appeared before me, this 2d day of June, 1859, Hawkins Smith, who deposes and says, that on the 30th day of May, 1859, one Joaquin Alvarez, in said county, did threaten to

<sup>1</sup> Wood's Dig. art. 1939.

<sup>2</sup> Id. 1930.

<sup>3</sup> Id. 1891-1897.

<sup>4</sup> Id. 704.

beat, bruise and wound [*or, kill, or commit other offence, as the case may be*], and that he has just cause to fear, and does fear that the said Joaquin Alvarez will beat, bruise and wound [*or, &c.*] him, this deponent, all of which is contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the people of the state of California. Wherefore deponent prays that a warrant may be issued for the arrest of said Joaquin Alvarez, and that he may be brought before a magistrate, and dealt with according to law.

HAWKINS SMITH.

Sworn and subscribed before me, this 2d day of June, 1859,  
A. B., Justice of the Peace.

*Peace Warrant.*

State of California, } ss: Justices' Court, 1st Township.  
County of                    ,  
The people of the state of California, to the sheriff of the  
county of                    , or any constable, marshal or policeman  
in this state:

A complaint, upon oath, having been this day laid before me, by Hawkins Smith, that Joaquin Alvarez has threatened to beat, bruise and wound the said Hawkins Smith, you are therefore commanded forthwith to arrest the above-named Joaquin Alvarez, and bring him before me, at                    , or in case of my absence or inability to act, before the nearest or most accessible magistrate in this county.

Dated at my office, this 2d day of June, A. D. 1859.

A. B., Justice of the Peace.

*Commitment on foregoing Complaint.*

State of California, } ss:  
County of                    ,  
To the sheriff of said county, greeting:  
Whereas, H. S. this day made complaint to me in writing, on oath, that Joaquin Alvarez, on the 30th day of May last past, threatened to, &c. [*as in the complaint*]: And whereas, it appearing to me, upon the examination of the said complainant, and E. F., and O. P., witnesses, duly made on oath, reduced to writing, and subscribed by them, that there was just reason to fear the commission of the said offence by the said Joaquin Alvarez; and he being brought before me on my warrant, was required to enter into recognizance in the sum of \$500, with sufficient surety to keep the peace toward the people of this state, and particularly toward the said complainant, for the period of six months. And the said Joaquin Alvarez having refused [*or, neglected*] to

find such security, you are therefore commanded, in the name of the people of the state of California, forthwith to convey him to the common jail of the said county, and to deliver him to the keeper thereof, who is hereby required to receive the said Joaquin Alvarez into his custody, and him safely keep in the said jail, until he shall find such security, or be discharged by due course of law.

Witness, &c.

*Order to Discharge Prisoner on Giving Peace Bonds.*

County, ss:

To the sheriff of the said county, greeting:

These are to command you forthwith to discharge out of your custody Joaquin Alvarez, if detained by you in said common jail, for no other cause than what is specified in his warrant of commitment, made by A. B., justice of the peace, dated the 2d day of June, 1858, for not finding sureties of the peace; he having since his said commitment, found such sureties, and duly given bond as required by law.

Witness my hand, this 10th day of June, 1859. W. H. G,  
County Judge.

*Peace Bond.*

State of California, } Justices' Court, A. B., Justice 1st Town-  
County of                } ship.

Personally appeared in the justices' court of the 1st township in and for the county of               , Joaquin Alvarez, Ignacio Soto and Carlos Blanco, and acknowledge themselves and each of them justly indebted to the people of the state of California, in the sum of five hundred dollars.

Sealed with their seals, and dated this the tenth day of June, A. D. 1859.

The condition of the above obligation is such, that whereas the above-bounden Joaquin Alvarez has been held to keep the peace by order of A. B., justice of the peace of the county of

Now, if the said above-bounden Joaquin Alvarez shall well and truly keep the peace toward the people of the state of California, and particularly toward Hawkins Smith, of said county, for the space of six months from the date of said order, then this recognizance is to be null and void, otherwise to remain in full force and effect.

Signed and sealed the day and date above written.

Witnessed and approved by me, } his  
this, the 10th day of June, 1859, } JOAQUIN X ALVAREZ.  
A. B., Justice. } mark.  
IGNACIO SOTO.  
CARLOS BLANCO.

State of California, }  
 City and County of San Francisco, } ss:

Carlos Blanco and Ignacio Soto being duly sworn, each for himself deposes and says, that he is a freeholder in said state of California, and that he is worth the sum of five hundred dollars, exclusive of property exempt from execution, and over and above all debts and liabilities.

CARLOS BLANCO.

IGNACIO SOTO.

Sworn and subscribed before me, this 10th day of June, 1859.

A. B., Justice, &c.

*Complaint before a Magistrate.*

State of California, } ss: Justice's Court, First Township.  
 County of Solano, }

Personally appeared before me, this 1st day of April, 1859, William Hock, who deposes and says, that on the eighth day of March, 1859, in said county, the crime of grand larceny was committed, to wit, by feloniously stealing, taking and carrying away forty-eight sovereigns, English coin, each sovereign of the value of four dollars and eighty-five cents, lawful money of the United States of America, and of the goods and chattels of William Hock. All of which is contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the people of the state of California. And said deponent accuses Antoine Grape of having committed said crime, and prays that a warrant may be issued for the arrest of said Antoine Grape, and that he may be brought before a magistrate, and dealt with according to law.

WILLIAM HOCK.

Sworn and subscribed before me, this 1st day of April, 1859.

PETER DOGBERRY, Justice, &c.

*Warrant of Arrest.*

State of California, } ss: Justices' Court, First Township.  
 County of Solano, }

The people of the state of California to any sheriff, constable, marshal or policeman, in this state, or the county of

A complaint, upon oath, having been this day laid before me, by William Hock, that the crime of grand larceny has been committed, and accusing Antoine Grape thereof, you are therefore commanded forthwith to arrest the above-named Antoine Grape and bring him before me, a justice of the peace, or, in case of my absence or inability to act, before the nearest or most accessible magistrate in this city and county.

Dated at my office, this 1st day of April, A. D. 1859.

PETER DOGBERRY, Justice of the Peace.

*Certificate to be endorsed on, or annexed to, a Warrant issued to another County, by an Inferior Magistrate.*

County of Solano, ss:

I, W. J. Hooton, county clerk, do certify that Peter Dogberry, whose genuine signature is affixed to the within warrant, was, at the time of signing the same, a justice of the peace in and for the said county, duly qualified and acting as such.

[L. s.] Witness my hand and the seal of the county court of said county, April 1st, 1859.

W. J. HOOTON, County Clerk.

*Affidavit to be endorsed or annexed in Place of the above Certificate.*

County of Solano, ss:

Henry R. Bradford, of said county, being duly sworn, says, that he is well acquainted with Peter Dogberry, whose name is signed to the within [or, the annexed] warrant, and knows his handwriting, and believes that the signature thereto is the signature and genuine handwriting of the said Peter Dogberry.

HENRY R. BRADFORD.

Sworn before me, April 1st, 1859.

GEORGE SCRIBER, Notary Public of Solano County.

*Endorsement on a Warrant issued by a Magistrate inferior to a County Judge, to be served in another County.*

This warrant may be executed in the county of Contra Costa.  
Martinez, Contra Costa County, }  
April 2d, 1859. } A. DEEP,  
Justice of the Peace, County of Contra Costa.

*Order of Discharge to be endorsed on the Depositions and Statement after the Defendant has been examined.*

County of \_\_\_\_\_, ss:

There being no sufficient cause to believe the within-named A. B. guilty of the offence within mentioned, I order him to be discharged.

June 1st, 1859.

M. N., Justice.

*Order holding Defendant to answer, to be endorsed in like Manner.*

It appearing to me by the within depositions [and statement, if any], that the offence therein mentioned [or any other offence, according to the fact, stating generally the nature thereof] has

been committed, and that there is sufficient cause to believe the within-named A. B. guilty thereof, I order that he be held to answer the same. [*If the offence be not bailable add: and that he be committed to the sheriff of the county of* ; *or, if bailable, add: and that he be admitted to bail in the sum of* , and be committed to the sheriff of the county of , until he gives such bail; *or, if he have given bail, add: and I have admitted him to bail to answer by the recognizance hereto annexed.*]

Dated, June 1, 1859.

M. N.,

Justice of the Peace of the County of .

*Application to enter a Person at the Industrial School, San Francisco.*

Office of the President of the Board of Supervisors of the City and County of San Francisco, May 1, 1859.

To the Hon. H. P. Coon, Police Judge:

Whereas, it has been represented to me that John Cox, a boy under the age of eighteen years, whose parents are dead, is leading an idle and dissolute life, and that he is a proper person for the industrial school,

Therefore, I pray your honor to cause the said John Cox to be brought before you, to the end that he may be duly committed to the charge of the board of managers of the industrial school department of said city and county.

E. W. BURR,

President Board of Supervisors.

*Order of Arrest, to send a Boy to the Industrial School, San Francisco.*

Chambers of the Police Judge.

State of California,

City and County of San Francisco. }

The people of the state of California, to any sheriff, constable, marshal, or policeman in the city and county of San Francisco:

It appearing from an application laid before me by M. J. Burke, Esq., chief of police of the city and county aforesaid, that there is sufficient cause to believe that John Cox, a boy under the age of eighteen years, whose parents are dead, is leading an idle and dissolute life, you are commanded forthwith to arrest the said John Cox and bring him before me, at the chambers of the police judge, in the city and county aforesaid.

Dated at my office, this first day of May, 1859.

H. P. COON,

Police Judge of the City and County of San Francisco.

Served by arresting the said John Cox, this second day of May, 1859.

B. S. BLITZ, Policeman.

*Bail Bond.*

Justices' Court.

State of California, } ss:  
 County of , }

An order having been made on the first day of June, 185 , by M. N., justice of the peace of the county of , that A. B. be held to answer upon the charge of grand larceny, upon which he has been duly admitted to bail in the sum of one thousand dollars, we, O. P. and Q. R., of the said county, hereby undertake that the above-named A. B. shall appear and answer the charge above mentioned, in whatever court it may be prosecuted, and shall at all times hold himself amenable to the orders and process of the court, and if convicted, shall appear for judgment, and render himself in execution thereof; or, if he fail to perform either of these conditions, that he will pay to the people of the state of California, the sum of one thousand dollars. O. P.

Witnessed and approved by me, } Q. R.  
 this 2d day of June, 1859. }

M. N., Justice of the County of .

State of California, } ss:  
 County of , }

O. P. and Q. R. being duly sworn, each for himself deposes and says, that he is a freeholder [*or*, householder] in said state of California, and that he is worth the sum of one thousand dollars, exclusive of property exempt from execution, and over and above all debts and liabilities.

Sworn and subscribed before me, }  
 this 2d day of June, 1859. }  
 M. N., Justice, &c.

*Commitment.*

State of California, }  
 County of }  
 Justices' Court of the County of .

The people of the state of California to the sheriff of the county of :

An order having been this day made by me, that John Cox be held to answer upon a charge of grand larceny committed in said county, on or about the day of May, 1859, you are commanded to receive him into your custody, and detain him until he be legally discharged.

Dated at the county of , this tenth day of June, A. D. 1859. M. N., Justice of the Peace of the county of .



*Commitment to Industrial School San Francisco.*

State of California,  
City and County of San Francisco, }  
The people of the state of California, to the superintendent of  
the industrial school of the city and county of San Francisco:

Whereas, an application has been made to me by M. J. Burke, Esq., chief of police, of said city and county, setting forth that John Cox, a boy under the age of eighteen years, whose parents are dead, is leading an idle and dissolute life, and praying for the arrest of said John Cox, and said John Cox having been brought before me, and the matter having been heard, and evidence having been given to my satisfaction, and an order having been made by me that he be committed to the industrial school of the city and county of San Francisco,

You are commanded to receive the said John Cox into your custody, and him safely keep until he be legally discharged.

Dated at the city and county of San Francisco, this third day of May, 1859.

H. P. Coon,  
Police Judge of the city and county of San Francisco.

## CHAPTER XXIX.

## MINES, MINING, AND WATER RIGHTS.

## I.—THE RIGHT OF THE STATE IN THE MINES.

By the English common law, mines of gold and silver were the exclusive property of the crown, and a royal grant of lands did not pass the title to the mines of the precious metals therein. Even the mines discovered upon private lands were claimed by the crown in virtue of its prerogative, together with the right to dig and carry away the minerals, and to do all things necessary to the exercise of that right.<sup>1</sup>

In this country it seems to have been considered that the several states of the Union, and not the federal government, are, in virtue of their respective sovereignties, entitled to those "royal rights," including the right of eminent domain, and the title to the mines of gold and silver, which by the English common law pertained to the crown. According to this doctrine, the United States has no *municipal* sovereignty within the limits of the several states.

In some of the states, as in New York, this exclusive and sovereign right of the state has been expressly asserted and defined by statute. In others, where no positive law of the kind existed, the courts have declared it as a common law doctrine. The latter is the case in California, the Supreme Court having laid down the doctrine that the state is entitled to all the rights in mines of gold and silver enjoyed by the crown under the common law; that such mines upon the public lands within this state belong, not to the United States, but to the state of California; and that the United States, in its ownership of the public lands, occupies the same position as a private proprietor, with the exception of an express exemption from state taxation; that the state has the

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<sup>1</sup> Blackstone, vol. i. p. 295; Collier on Mines, p. 13.

exclusive right to authorize the mines to be worked, to pass laws for their regulation, to license miners, and to affix such terms and conditions as she may deem proper to the freedom of their use.<sup>1</sup>

## II.—THE RIGHTS OF MINERS.

The legislation of the state and the adjudications of the courts bearing upon the subject of mining, and based upon the right thus claimed, have given and confirmed the privilege of working the mines of gold and silver upon the public lands to all who desire it, subject to certain conditions and regulations.

With reference to mines of gold and silver found on the lands of private individuals, although the state claims to be the owner of such mines, it has not dedicated the right to work them to its citizens. The privilege conferred extends only to the public lands.<sup>2</sup>

The nature and extent of the rights enjoyed by those who avail themselves of the permission of the state to prosecute the search for the precious metals upon the public lands within this state, will now be treated of in detail.

### 1st.—*The Right to Mine upon Lands occupied for Grazing or Agricultural Purposes.*

It has been the policy, both of the general and state government, to reserve mining lands from settlement for agricultural purposes. The person who settles upon such lands does so subject to the rights of the miners, who may, notwithstanding such prior occupation and possession, proceed to extract the metals which may be found there, and may use all necessary means for that purpose, but with the least injury and damage practicable to the occupying claimant; the spirit and policy of the law being apparently to make the right of the agriculturist to use and enjoy the public lands, subordinate to the right of the miner to search for gold.<sup>3</sup>

Section first of the act of April, 1852, "presenting the mode of maintaining and defending possessory actions on public lands in this state," clearly gives permission to all persons to work the

<sup>1</sup> Hicks v. Bell, 8 Cal. R. 219; Stokes v. Barrett, 5 Cal. R. 86.

<sup>2</sup> Stokes v. Barrett, 5 Cal. R. 2.

<sup>3</sup> McClintock v. Bryden, 5 Cal. 97; Tartar v. Spring Creek Co., 5 Cal. 295; Burdge v. Underwood, 6 Cal. 46.

mines upon public lands, although they may be in the possession of another for agricultural purposes. The section reads as follows:

"Any person now occupying and settled upon, or who may hereafter occupy or settle upon any of the public lands in this state, for the purpose of cultivating or grazing the same, may commence and maintain any action for interference with, or injuries done to his or her possession of said land, against any person or persons so interfering with or injuring such land or possession: *provided*, that if the lands so occupied and possessed contain mines of any of the precious metals, the possession or claim of the person or persons occupying the same for the purposes aforesaid, shall not preclude the working of such mines by any person or persons desiring so to do, as fully and unreservedly as they might or could do had no possession or claim been made for grazing or agricultural purposes."

And the right to mine for the precious metals carries with it as an incident the right to the use of wood and water upon the public land where gold has been discovered.<sup>1</sup>

But neither the right to mine nor the incidental rights alluded to have been extended to any except the public lands; and though the Supreme Court has laid down the doctrine that the state is the legitimate owner, as well of the gold and silver found in the lands of private individuals as of that contained in the public domain, it has not decided in favor of the right of the citizen to seek for gold upon private lands. On the contrary, it declared in the case of *Stokes vs. Barrett* that, "to authorize an invasion of private property, in order to enjoy a public franchise, would require more specific legislation than had yet been resorted to."

Under the statutes and judicial decisions above cited, the occupant of lands held and used for agricultural purposes would seem to be left without adequate protection against persons who might enter upon the premises so occupied, either with the *bona fide* intention of searching thereon for the precious metals, or upon the pretence of such intention. To obviate evils which might possibly grow out of this state of things, the act of April 25,

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<sup>1</sup> *Tartar v. Spring Creek Mining Co.* 5 Cal 305.

1855, "to protect the owners of growing crops, buildings and other improvements, in the mining districts of this state," provides as follows:

1. No person shall, for mining purposes, destroy or injure any growing crops of grain or garden vegetables, growing upon the mineral lands of this state, nor undermine or injure any house, building, improvement or fruit-trees standing upon mineral lands, and the property of another, except as hereinafter provided.

2. Whenever any person, for mining purposes, shall desire to occupy or use any mineral lands of this state, then occupied by such growing crops of grain, garden vegetables, fruit-trees, houses, buildings or other improvements, the property of another, such person shall first give bond to the owner of the growing crop, building, fruit-trees or other improvement, to be approved by a justice of the peace of the township, with two or more sufficient sureties, in a sum to be fixed by three disinterested citizens, householders of the township, one to be selected by the obligor, one by the obligee, and one by a justice of the peace of the township. Conditioned that the obligor shall pay to the obligee any and all damages which the obligee may sustain in consequence of the destruction by the obligor, or those in his employ, of the growing crops, fruit-trees, improvements or buildings of the obligee; provided, that the word improvements in this act, shall be construed to mean any superstructure on said farm, ranch or garden, and nothing more.

3. If any person or persons shall violate the provisions of the first and second sections of this act, he or they shall be deemed guilty of a misdemeanor; and on conviction thereof, before any court of competent jurisdiction, shall be fined in a sum not exceeding two hundred dollars, nor less than fifty dollars, or by imprisonment in the county jail of said county not exceeding three months, either or both, at the discretion of the court; *provided*, nothing in this act shall prevent miners from working any mineral lands in the state, after the growing crops on the same are harvested.

*2d.—The Right to Mine upon Lands already occupied for other than Grazing or Agricultural Purposes.*

The act of April 20, 1852, in regard to possessory actions, above cited, authorizes persons to prosecute the search for gold and silver upon public lands occupied by others for "grazing and agricultural purposes." This is, however the full extent of the statute, and the occupant of mineral lands for any other than strictly "grazing and agricultural purposes," may rely upon his possession against a trespasser, even though the latter enter upon the premises for mining purposes. The act in question being a departure from the policy of the state to permit persons in all capacities to occupy the public lands, and by such occupation to acquire the right of undisturbed enjoyment against all the world but the true owner, and its effect being to legalize what would otherwise have been a trespass, it cannot be extended by implication, so as to embrace any cases other than those specially provided for.<sup>1</sup>

Accordingly, persons settled in good faith upon lots in the mining towns, and carrying on business upon them, will be protected in the possession and enjoyment of the premises so occupied, notwithstanding that gold may be discovered thereon, or that the use of said premises may be convenient and desirable to facilitate mining operations carried on in the vicinity.

In the case of *Fitzgerald vs. Urton*, the plaintiff was in possession of a town lot, on which he had erected a house used as a hotel. The lot was enclosed by a substantial fence, and was used as a poultry and wood yard, and for other purposes necessary in carrying on the business of hotel keeping. The plaintiff being in quiet use and possession of the premises, the defendants entered upon the lot for mining purposes, claiming that they had a right so to do as miners, in prosecuting the search for gold, and by digging and sluicing, damaged and inconvenienced the plaintiff in his business, threatening, if their proceedings were not restrained, entirely to deprive him of the benefits of his possession. The action was brought in the District Court, to restrain the defendants from the commission of a nuisance, in digging a

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<sup>1</sup> *Fitzgerald v. Urton*, 5 Cal. 306; *Tartar v. Spring Creek Co.*, 5 Cal. 306; *Burdge v. Underwood*, 6 Cal. 45.

ditch and mining within the plaintiff's enclosure. At the trial, the court charged the jury that, "if the plaintiff had possession and use of the lot claimed and improved, before the location and possession of a mining claim by defendants on said premises, the plaintiff is entitled to hold the same, and the defendants have committed a trespass, and are liable in damages." Verdict for plaintiff.

Upon appeal, the Supreme Court declared these instructions of the court below substantially correct, and affirmed the judgment. In their opinion in this case, the court hold the following language: "We do not think that the occupation of the lot by the present plaintiff for the purpose of hotel keeping, is inconsistent with the policy of the state with regard to mining claims. The interests and wants of the mining communities demand, that some facilities and accommodations should be afforded to the business of mining, and that persons settled in good faith upon lots in the mining towns, and carrying on business, should be reasonably protected, and not left at the mercy of any malicious or irresponsible party who may choose to invade their possession upon the specious pretext of mining."

In the case of *Tartar vs. The Spring Creek Water and Mining Company*, the action was commenced by a bill for an injunction to restrain the defendants from diverting the water-course of plaintiff's mill, to use it for mining purposes. Tartar, the plaintiff, had succeeded to the rights of Chauncey & Co., the original proprietors of the mill. In June, 1852, Chauncey & Co. commenced the construction of a saw-mill on lands of the United States, in Shasta county, at the mouth of a small stream, called Spring Creek, and completed it in November of the same year, at a cost of about ten thousand dollars. The lands were mineral lands of the United States, containing mines of gold. The length of the creek from its source to its mouth, was about sixteen miles, and ran entirely through lands of the United States, containing gold mines.

As soon as the mill was completed, Chauncey & Co. occupied it, and continued to use it until the 15th day of January, 1854. The water of said creek was the motive power by which the machinery of the mill was propelled. The defendants, who were miners, and a corporation under the laws of this state, in June,

1853, commenced the construction of a dam, ditch and flumes, about five miles above the saw-mill, in order to divert the water of the creek to mining lands in the immediate vicinity, to be used for the purposes of mining. The water was necessary, to enable the defendants to extract the gold from the land where the same was conveyed; and the ditch and flumes were constructed in 1853, to the extent of about five miles, and the dam across said creek was completed, by which the water was diverted, in October of the same year, from its natural channel into the said ditch and flume, and conveyed to the mining lands in its vicinity, and there was used, and had since been used, by the defendants for mining purposes, up to the time of filing the complaint. The cost of the construction of the said flume, ditch and dam, was about eighteen thousand dollars.

For five months of the year, from June 1st to November 1st, the water of said creek is not sufficient for the said miners and the propelling of said mill at the same time; but during the rest of the year the water of the stream is sufficient, both for the defendants and plaintiff.

The plaintiff succeeded to the rights of Chauncey & Co. on January the 15th, 1854, with a full knowledge of the above facts, and continued to use the mill until July, 1854. The defendants, since the 15th of January, 1854, and before the commencement of this suit, extended their ditch and flume about a mile, at a cost of two thousand dollars, and the plaintiff sold and delivered lumber to them, amounting to several hundred dollars, to be used in such extension, and was paid for the same. By means of the diversion of the water during the time, the water was insufficient for both the plaintiff and defendants, the plaintiff, in the year 1854, and before the commencement of the suit, did not make as much by his mill as he otherwise would have done, to the amount of one thousand dollars.

Upon the foregoing state of facts a perpetual injunction was granted, and damages decreed to plaintiff, which decision and decree were affirmed upon appeal to the Supreme Court.

Heydenfeldt, J., in delivering the opinion of the court, says:

"In *Irwin vs. Phillips*, we say, 'that however much the policy of the state, as indicated by her legislation, has conferred the privilege to work the mines, it has equally conferred the right to



divert the streams from their natural channels.' And further we say, 'The miner who selects a piece of ground to work, must take it as he finds it, subject to prior rights which have an equal equity, on account of an equal recognition by the sovereign power.'

"It results from the consideration we have given the case, that the right to mine for the precious metals can only be exercised upon public lands; that although it carries with it the incidents to the right, such as the use of wood and water, those incidents must also be of the public domain in like manner as the lands; that a prior appropriation of either to steady individual purpose, establishes a *quasi* private proprietorship, which entitles the holder to be protected in its quiet enjoyment against all the world but the true owner, except in the single case provided to the contrary by the statute which I have already adverted to."

In the case of *Burdge vs. Underwood*,<sup>1</sup> the plaintiff brought his action to abate a nuisance (which nuisance was alleged to consist in the digging of a ditch through plaintiff's enclosure), and for damages. The defence set up that the ditch was made to conduct water for mining purposes, and that the land is public land, only occupied by plaintiff for agricultural and grazing purposes.

The facts of the case appearing before the court below were these: in 1852, the plaintiff took up a tract of public land, which he had since used for agricultural and grazing purposes. It further appeared, that within the time allowed by law, and before the commission of the acts complained of, the plaintiff had constructed a corral, dwelling and out-houses, and fences, greatly exceeding in value the sum of two hundred dollars. That while plaintiff was there residing upon, cultivating, and grazing said land, the defendants, for the purpose of conveying water to certain mining claims owned by them, and distant about one mile from plaintiff's premises, constructed the ditch mentioned in plaintiff's complaint, through a part of plaintiff's enclosure, and within twenty-five or thirty feet of plaintiff's corral, at the time and afterward used by him for corralling his cattle, and to the depth, near said corral, of about six feet. That

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<sup>1</sup> 6 Cal. 44.

said ditch was dug against the wishes and consent of plaintiff for the purpose aforesaid, and upon the most practicable route to convey the water to said claims from a ravine above the premises of the plaintiff. That it could have been constructed so as not to run through or interfere with the plaintiff's premises, but at a greatly increased cost. That a portion of said premises, some distance from said corral, had been prospected and found to contain gold. That said ditch prevents plaintiff from using his corral without endangering his animals.

The court rendered judgment for plaintiff for damages, and for the abatement of the nuisance, which judgment was affirmed upon appeal to the Supreme Court. In the opinion delivered by Heydenfelt, J., that court reiterates the reasoning employed in the cases last cited, and in language substantially similar. It would seem from this decision that the miner, in prosecuting his legitimate business, has no right to dig or work within the enclosure surrounding a dwelling-house, corral, or other improvements of another.

### *3d.—The Rights of Foreign Miners.*

The laws of this state prohibit foreigners from taking gold out of the mines, except upon obtaining a license.

The act of March 30th, 1853, as subsequently amended, and omitting such portions as have been repealed, provides as follows :

SEC. 1. No person not a citizen of the United States, or who shall not have declared his intention to become such prior to the passage of this act, according to law (California Indians excepted) shall be allowed to take gold from the mines of this state, or hold a mining claim therein, unless he shall first procure and pay a license therefor, as hereinafter provided.

SEC. 2. It shall be the duty of the controller of state to procure a sufficient number of blank licenses, which shall be substantially in the following form, and numbered consecutively, and a record thereof be filed in his office :

[See *Forms*, at the end of this chapter.]

Every subsequent license after the first, shall be dated from the expiration of the former license, issued by the sheriff or his

deputy, to any foreign miner, who shall have been engaged in mining from the expiration of such former license.

SEC. 3. The sheriff of each county shall be the collector of license tax, under the provisions of this act, who, before entering upon the duties herein provided for; shall enter into bond to the state, with two or more sureties, to be approved by the board of supervisors, if any such board exist in his county; if there be no such board, then by the county judge, in the sum of fifteen thousand dollars, conditioned for the faithful performance of the duties required of him by this act, which bond shall be filed in the office of the clerk of said county.

[SEC. 4, repealed April 7, 1857.]

SEC. 5. The controller of state shall fill the blanks for the counties, which have been left in the printed form, and shall issue to the recorder of each mining county, such number of licenses as may be required for the use of said county, taking a receipt therefor, which receipt shall be recorded in a book provided for that purpose, and shall charge the same against said recorder; and said recorder shall execute a bond to the state, conditioned for the faithful performance of all the duties required of him by this act, in the sum of ten thousand dollars, to be approved by the governor and controller, and filed in the office of the controller.

SEC. 6. The amount to be paid for each license shall be at the rate of four dollars per month, and said license shall in no case be transferable.

SEC. 7. The recorder shall deliver to the sheriff of his county such number of licenses as said sheriff may require, charging him therewith, and taking his receipt therefor. The sheriff shall make monthly returns to the recorder of his county, of the number of licenses issued, and to whom, and the amount of money received. The first returns shall be made to the recorder on the first Monday of May next, and thereafter a return shall be made on the first Monday of each succeeding month, as herein specified.

SEC. 8. It is hereby made the duty of the treasurer of each county to which licenses have been issued, to report to the treasurer of state on the first Monday of August next, and on the first Monday of every third month thereafter, the amount of money received by him on account of foreign miners' licenses.

**Sec. 9.** Fifty per cent. of the net proceeds of all moneys collected under the provisions of this act, shall be paid into the state treasury, and shall constitute a part of the general fund; the remaining fifty per cent. of the net proceeds shall be paid into the general fund of the county; and it shall be the duty of the sheriff to pay over to the county treasurer, monthly, the amounts specified in this section.

**Sec. 10.** The collector may seize the property of any person liable to, and refusing to pay such tax, and sell at public auction on one hour's notice, by proclamation, and transfer the title thereof to the person paying the highest price therefor, and after deducting the tax and necessary expenses incurred by reason of such refusal and sale of property, the collector shall return the surplus of the proceeds of the sale, if any, to the person or persons whose property was sold: *provided*, that should any person liable to pay such tax in any county of this state, escape into any other county with the intent to evade the payment of such tax, then and in that event it shall be lawful for the collector to pursue such person and enforce the payment of such tax in the same manner as if no such escape had been made. Any foreigner representing himself to be a citizen of the United States, shall, in absence of his certificate to that effect, satisfy the collector of the correctness of his statement by affidavit, or otherwise, and that the collector be and is empowered to administer such oath or affirmation. All foreigners residing in the mining districts of this state shall be considered miners under the provisions of this act, unless they are directly engaged in some other lawful business avocation.

**Sec. 11.** Immediately preceding the time provided by law for the final settlement of the county treasurer with the treasurer of state, it shall be the duty of each recorder to whom licenses have been issued, to report to the controller of state the number of licenses on hand in his office, as also the number in the hands of the sheriff, who is hereby required to report to said recorder the number of licenses not disposed of, for which he has receipted to the said recorder.

**Sec. 12.** The controller of state shall, as soon as practicable, compare the returns of the sheriff with reports of the county recorder; and if there should be any discrepancy in the statements, it shall be the duty of the controller to immediately inform the prosecuting attorney of the county in which such delinquent

resides, who shall commence suit against such delinquent and his sureties forthwith.

SEC. 13. Any sheriff or his deputy who shall neglect or refuse to pay over the money collected by him or them, under the provisions of this act, or shall appropriate any part thereof to his or their use, other than the percentage they are entitled to retain by the provisions of this act, shall be deemed guilty of embezzlement, and upon conviction thereof, shall be punished by imprisonment in the state prison, any time not less than one year nor more than ten years.

SEC. 14. Any officer charged with the collection of the tax provided to be collected by this act, who shall give any receipt other than the receipt prescribed in this act, or receive money for such license without giving the necessary receipt, shall be deemed guilty of a misdemeanor, and upon conviction shall be fined in a sum not exceeding one thousand dollars, and be imprisoned in the county jail not exceeding six months.

SEC. 15. It shall be the duty of the different sheriffs to return all unsold licenses to the county recorder, prior to the fifteenth day of December of each year, and receive new licenses, and the county recorder shall immediately transmit to the controller of state, said licenses; such licenses so returned shall be placed to the credit of the different county recorders, on the books of the controller and the licenses destroyed.

SEC. 16. Any sheriff, tax collector, or deputy collector, who shall sell or cause to be sold, any foreign miner's license, with the date of the sale left blank, or which shall not be dated or signed with ink, and any person who shall make any alteration, or cause the same to be made in any license, shall be deemed guilty of a misdemeanor, and upon conviction shall be fined in a sum not exceeding one thousand dollars, and imprisonment in the state prison not exceeding six months; and the license so sold with blank date, or which shall not be signed and dated with ink, or which shall have been altered, shall be received in evidence in any court of competent jurisdiction.

SEC. 17. Any person or company hiring foreigners to work in the mines of this state, shall be liable for the amount of the licenses for each person so employed.

SEC. 18. The sheriff shall have power, and it is hereby made

his duty, to appoint a sufficient number of deputy collectors to assist him in the collection of the tax provided to be collected by this act, said deputy collectors to be paid not less than fifteen per cent. on all sums collected by them; and the sheriff shall be responsible for the acts of said deputy collectors, and may require from them such bond and surety as he may deem proper for his own indemnification, and for such service he shall be entitled to receive three per cent. on all sums collected by them. Should the board of supervisors, or, in the event of there being no such board, then the county judge, deem the percentage to be paid to deputy collectors by the provisions of this section to be insufficient, an order may be entered by the board of supervisors or the county judge providing that an additional sum shall be paid such deputy collector, not to exceed in all twenty-five per cent., to be paid as herein provided. The county recorder of each county shall receive three per cent. on all sums collected under the provisions of this act.

SEC. 19. That the sheriff be required to receive good, clean gold-dust, when tendered, at seventeen dollars per ounce, in payment for licenses, and be required to pay the same into the treasury at the same rate.

The supplementary act of April 7, 1857, provides for the transfer by the treasurer, to the controller of the state, of all books and papers in his office connected with the issuance of foreign miners' licenses, &c., and makes it the duty of the controller to make the necessary settlement with the different officers for licenses theretofore issued. The said act also requires the treasurer of each county to which licenses have been issued, to make reports to the controller of the amounts of moneys received by him on account of foreign miners' licenses, on the first Monday of every third month, beginning on the first Monday of August, 1857.

By the amendatory and supplementary act of April 26, 1858, it is provided as follows:

"Any person or company hiring foreigners, or interested with them as partners, or renting, or on shares, or in any manner connected with any foreigner or foreigners, in working or in possession of any mining ground in this state, shall be held liable for the amount of license of each and every foreigner with whom such person, or company, is so connected or interested. All

mining ground, worked or possessed, all improvements, all tools and machinery used in working such ground, by said person, or company, shall be subject to sale for the payment of said license tax, in the manner provided in section seven of this act. The collector shall have power to require any person, or company, believed to be indebted to, or to have money, gold-dust, or property of any kind, belonging to, or in which any such foreigner is interested, in his or their possession or under his or their control, to answer, as under oath, to such indebtedness, or the possession of such money, gold-dust, or other property. In case a party is indebted, or has possession or control of any moneys, gold-dust or other property, as aforesaid, of such foreigner or foreigners, he may collect from such party the amount of such license, and may require the delivery of such money, gold-dust, or property, as aforesaid; and in all cases the receipt of the collector to said party shall be a complete bar to any demand made against such party, or his legal representative, for the amounts of money, gold-dust, or property, embraced therein. Any person or company, hiring foreigners to work in the mines of this state, shall be liable for the amount of the licenses for each person so employed."

In the case of the *People vs. Naglee*,<sup>1</sup> the Supreme Court passed upon the constitutionality of the laws requiring foreigners to pay a license fee, in order to entitle them to the privilege of working the gold mines in this state, and decided that the act of the legislature prohibiting them from working the mines, except upon the condition of paying a certain sum monthly for the said privilege, was not repugnant to the constitution of the United States, or the constitution of this state, or the treaties of the United States with foreign powers.

But the laws on this subject must be enforced by the state, through her appointed officers, the mode of enforcing them being regulated by the provisions of the statute. Private parties cannot take upon themselves the execution of them, nor assume, upon the plea of the prohibitions of the law, to disturb the quiet possession of others. The mere fact that the parties working a mining claim are foreigners who have obtained no license, will

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<sup>1</sup> 1 Cal. 232.

not justify third persons in ousting them without the intervention of the law; and a foreign miner so ousted may recover possession in an action for that purpose.<sup>1</sup>

*4th.—The Jurisdiction of Mining Actions, and the Laws governing such Actions.*

No general mining laws to take effect throughout the state have been enacted by the legislature; but it has been provided by section 621 of the Practice Act, that, "in actions respecting mining claims, proof shall be admitted of the customs, usages or regulations established and in force at the bar or diggings embracing such claim; and such customs, usages or regulations, when not in conflict with the constitution and laws of the state, shall govern the decision of the action."

Though this section occurs in that title of the Practice Act which treats of "proceedings in justices' courts," it has been construed as applicable to all actions respecting mining claims, in whatever court they may be brought.

By the provisions of the act "concerning courts of justice" (section 67, subdivision 10, as amended), jurisdiction is conferred on justices' courts, of actions to determine the right to a mining claim, and for damages for injury to the same, when the damages claimed do not exceed two hundred dollars.

Previous to the amendment of this section it had been held that justices' courts had no jurisdiction to try actions for damages for injuries to mining claims, such jurisdiction not having been expressly conferred by the statute as it stood prior to the amendment.

Though the language of the subdivision conferring upon justices' courts jurisdiction to try actions to determine the right to a mining claim is general, and expresses no limitation as to the value of the claim and the consequent amount in controversy, it has been held that their jurisdiction is restricted to cases where the claim in dispute does not exceed \$200.<sup>2</sup>

In the case of *Small vs. Gwinn*, last cited, the court held that the objection to the jurisdiction of the justice, on the ground of excess in the value of the subject of controversy, may be made

<sup>1</sup> *Mitchell v. Hagood*, 6 Cal. 148.

<sup>2</sup> *Zander v. Coe*, 5 Cal. 280; *Van Etten v. Steele*, 6 Cal. 19; *Small v. Gwinn*, 6 Cal. 447.



by the answer, and should be decided before proceeding to hear the merits of the case.

In actions respecting miners' claims in a justice's court, the justice may, upon application and one day's notice to the adverse party, appoint a receiver of the proceeds of the claim pending the action. If the parties agree upon a person, he shall be appointed such receiver. If the parties do not agree, the justice shall appoint a receiver, who shall take an oath, which shall be filed with the justice, that he is not interested in the action between the parties, and that he will honestly keep an account of all gold-dust or metals of any kind, the proceeds of the claim or claims in dispute. After the appointment of such receiver, the justice shall have power to issue a written order to any sheriff or constable, to put such receiver into possession of such claim; which order said sheriff or constable shall execute, and the receiver shall remain in possession of the claim or claims, so long as said action may remain undetermined in any court. The court in which the action may be pending, shall have authority upon application of either party, with two days' notice to the other, from time to time, to make such orders for the disposition of the proceeds of such claim or claims for the safety of the same, as may seem proper. The court in which the action may be pending shall also have power, upon application of the receiver, based upon his affidavit, to punish as for contempt, all persons who have been guilty of disturbing the receiver in the possession of the claim."<sup>1</sup>

The receiver must keep an accurate account of all the proceeds of the claim pending the action, and of all amounts paid out for working the same, and shall retain the proceeds and pay the same over, pursuant to the order of the court. The receiver shall also be required, on demand of either party, to give security for the faithful performance of his trust, and shall be allowed for the same a reasonable compensation, to be paid out of the proceeds of the claim in his hands, but in no case exceeding ten per cent. upon such proceeds.

Where the value of the claim in controversy exceeds two hundred dollars, a justice's court can exercise no jurisdiction, and

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<sup>1</sup> Wood's Dig. art. 1874.

that of the District Court, which is conferred and defined by the constitution, and cannot be interfered with by statute, applies.<sup>1</sup>

From the provisions of section 621 of the Practice Act above cited, it will be seen that the regulations and usages established by the miners of each particular camp, bar, or diggings, when not in conflict with the constitution or statutes of the state, constitute the law by which the rights of the parties within the limits of such camp, bar, or diggings, are to be determined. These rules and regulations, generally spoken of as "the mining laws" of the particular district where they have been adopted or are in force, though differing in many of their details, such as the extent of the claims allowed to be taken up, the mode of taking them up, &c., still have a substantial similarity in all their principal features throughout the mining region of this state. The "mining laws" of the Jacksonville and other districts, which will be found among the accompanying collection of forms, are furnished as examples of those which have been most generally adopted.

The right to the use of water for mining purposes, and the appropriation of it by a diversion of the stream, is not, within the meaning of the law, "an injury to personal property," and accordingly justices of the peace have no jurisdiction over an action for an injury to such right.<sup>2</sup>

The District Court has jurisdiction of an action brought by one of the partners of a mining company, against the company, to recover his share, which had been sold for an alleged non-payment of an assessment, and to recover at the same time a sum of money claimed as his proportionate share of the gold taken out by the company.<sup>3</sup>

In an action by a company of miners to recover possession of a mining claim, a person who was a member of the company at the time of the alleged detention, and who, prior to the commencement of the suit, in consideration of unpaid assessments, sold his interest to his copartners in the claim without warranty, is not a competent witness, as he is interested in the damages sought to be recovered.<sup>4</sup>

A misdescription in the notice of the claimant to a quartz-lead,

<sup>1</sup> Hicks v. Bell, 8 Cal. 219.

<sup>2</sup> Hill v. Newman, 5 Cal. R. 445.

<sup>3</sup> Schuepfer v. Evans, 4 Cal. 212.

<sup>4</sup> Packer v. Heaton, 9 Cal. R. 506.

posted up near the premises, in pursuance of the requirement of the mining laws of the district in which the lead is situated and where the lead is underground and undeveloped, will not vitiate the claim.<sup>1</sup>

*5th.—The Rights of Miners with Respect to Each Other.*

As has been previously stated, the rights of miners in reference to the extent, possession and enjoyment of their claims, are mainly regulated by the rules or "mining laws" adopted at each particular district, camp, bar, or diggings. But a number of general questions affecting such rights have become the subjects of litigation, and been passed upon by the courts of the state. To these adjudications we shall now make such reference as will suffice to show what points of this character may be regarded as settled by authority.

Actual possession of a portion of a mining claim, according to the custom of miners in a given locality, extends by construction to the limits of the claim held in accordance with such customs.<sup>2</sup>

Miners have, by the laws of this state, a species of property in their mining grounds, which they may rightfully protect by abating a nuisance to the same. And they have a right, where they have located their claims and appropriated the waters of a stream for mining purposes, to remove a dam (erected subsequent to their occupation) which floods their claims and prevents an outlet for their tailings. Such a dam may be regarded as a nuisance, which they may lawfully abate, provided it be done in a peaceable manner, and without a breach of the peace.<sup>3</sup>

In the absence of mining regulations, the fact that a party has located a claim bounded by another, raises no implication that the last located claim corresponds in size, or in the direction of its lines, with the former.<sup>4</sup>

One who has been employed to work on a mining claim, to be paid out of the proceeds, and is in possession thereof, his contract being a verbal one, will have no other resort than against his employer, if the latter sells the claim while the employer is working it. The purchaser who takes, without notice of the

<sup>1</sup> Johnson v. Parks, 10 Cal. 446.

<sup>2</sup> Hicks v. Ball, 3 Cal. R. 219.

<sup>3</sup> Stiles v. Laird, 5 Cal. R. 130.

<sup>4</sup> Live Yankee Co. v. Oregon Co. 7 Cal. 46.

contract, holds the claim not subject or liable to the vendor's agreement with his employee.<sup>1</sup>

When a place of deposit for tailings is necessary for the working of a mine, the miner has a right to appropriate such ground as may be necessary for that purpose, provided he does not interfere with pre-existing rights. But his intention to appropriate such ground must be clearly manifested by acts. Mere posting notices is not sufficient. He must claim the place of deposit as such, or as a mining claim.<sup>2</sup>

To suffer the tailings to flow at random, without obstructions to confine or keep them, is conclusive evidence of abandonment, unless there is some peculiarity in the location which may constitute an exception to this rule; as where no artificial obstruction is required to confine the tailings within proper limits, in which case none is necessary.<sup>3</sup>

Where one miner allows his tailings to flow upon the ground of another, the latter is entitled to them; but the fact that he suffers them to mingle with the tailings of another miner, will give no right to a stranger to appropriate the mixed mass.<sup>4</sup>

Where the regulations of a mining locality required that every claim should be worked two days in every ten, it was held that the efforts of the owners of a claim to procure machinery for working the claim are to be considered as work done on the claim. And work upon adjoining land, in constructing a drain to enable the owners to work their claim, is to be viewed in the same light.<sup>5</sup>

One party may locate ground for fluming purposes, and another party may at the same or a different time, locate the same ground for mining purposes; the two locations being for different purposes, will not conflict. So, also, a person may take up a claim for mining purposes, that has been, and still is, used as a place of deposit for tailings by another, but in such case, his mining rights will be subject to the prior right of deposit.<sup>6</sup>

### III.—WATER RIGHTS.

At the common law every proprietor of lands on the banks of a running stream, was held to have an equal right to the use of

<sup>1</sup> *Jenkins v. Redding*, 8 Cal. 598.

<sup>2</sup> *Jones v. Jackson*, 9 Cal. 287.

<sup>3</sup> *Packer et al. v. Heaton*, 9 Cal. R. 568.

<sup>4</sup> *O'Keefe v. Cunningham*, 9 Cal. 569.

the water which flowed in the stream adjacent to his lands, as it was wont to run; without diminution or alteration; and no one proprietor had a right to use the water to the prejudice of others above or below him, except in virtue of some prior title to its exclusive enjoyment. No one had any property in the water itself, but only a simple usufruct, or right to its use, as it flowed along. He might make use of it as it passed over his land, but could not detain or divert it. While upon his own land he might, indeed, turn it from its proper channel, and give it any direction he chose, during its passage across his premises and within their boundaries. But upon its departure from those limits, he was bound to restore it to its natural bed, so that it should enter upon his neighbor's land by the same channel, and at the same point as if it had not been used or disturbed. Neither could he, without the consent of the adjoining proprietors, so use the water as to diminish the quantity which would descend to those below, or throw it back upon the lands of the proprietors above him, unless by virtue of a valid grant, or an uninterrupted enjoyment of twenty years, which was taken as evidence of such a grant. These principles are in accordance with, and seem to grow out of the common law maxim: "Water flows, and must be permitted to flow as it has been used to flow."<sup>1</sup>

They apply, however, only to natural watercourses, and not to artificial ones. And where a running stream is created, as it were, by the owner of the land, as where water is raised from a mine by a steam-engine, or runs by a spout from the eaves of a row of houses, and is thus thrown upon, or flows beneficially into a neighbor's lands, and is used by him, no right to the continued use of the stream so created exists, for that would unreasonably compel the owner of the mine, or of the row of houses, to keep his engine in motion or his buildings unaltered, for the benefit of another.<sup>2</sup>

In this state the common law doctrines, in reference to water rights, have been materially modified, the policy of our laws requiring such modification, in the application of those doctrines to the use of water for mining purposes. And it has been held by

<sup>1</sup> *Aqua currit et debet currere, ut currere solebat.*

<sup>2</sup> Kent's Commentaries, vol. III. pp. 569, 570, 9th edition; Gale & Whalley on Easements, p. 182; Angell on Watercourses, p. 86.

our Supreme Court that the right to water exists without private ownership of the soil, upon the mere ground of prior location upon the land, or prior appropriation and use of the water.<sup>1</sup>

A brief review of the adjudications upon this subject, so far as they bear upon the rights and interests of miners, will show what principles may be considered as settled in this state.

In the case of Eddy and others against Simpson and others,<sup>2</sup> the action was brought to recover damages for interfering with the water right of the plaintiffs. The plaintiffs had prior occupancy of the waters of Shady Creek, by means of a dam and a ditch constructed by them, and used the same for mining purposes. The defendants, by like means, obtained the use for like purposes, of other neighboring streams, and after using the water thereof, it flowed by natural channels into Shady Creek, above plaintiffs' dam. Defendants then built a dam above plaintiffs' dam, on Shady Creek, and withdrew a portion thereof from plaintiffs' works, so as to leave them deficient in supply, and at times without water for their purposes. The defence was based upon the fact that defendants having by their works added to the quantity of water in Shady Creek, they had a right to withdraw a like quantity for their own use; and this was the question at issue.

The District Court sustained the defence set up, and held that defendants had an exclusive right to the water which they had caused to flow into Shady Creek, and could withdraw the same. Upon an appeal to the Supreme Court the judgment of the District Court was reversed.

The following language was employed in the opinion:

"In considering the question presented, it is to be observed, that the foundation of the plaintiffs' right was their first possession. Of all the waters running into Shady Creek they were in possession and use until defendants constructed their ditch above them, running into French Corral. There is no pretence of right in the defendants to carry off water from Shady Creek, except a claim of property in the water from Cherokee Corral.

The owner of land through which a stream flows, merely transmits the water over its surface, having the right to its reasonable

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<sup>1</sup> Hill v. Newman, 5 Cal. R. 445.

<sup>2</sup> 8 Cal. R. 249.

use during its passage. The right is not in the *corpus* of the water, and only continues with its possession.

When the water of Grizzly Cañon and Bloody Run left the defendants, at Cherokee Corral, all right to and interest in that water was lost by the defendants. It might be made the property of whomsoever chose to possess it. Without the agency of the defendants it found its way into Shady Creek, joining the waters then in the possession of the plaintiffs, and became a part of the body of water used and possessed by them.

As defendants had lost all right to the water, they could have no right to withdraw it from the possession of the plaintiffs. The rule laid down by the court below, while it is a departure from all the rules governing this description of property, would be impracticable in its application, and we think it much safer to adhere to known principles and well-settled law, so far as they can be made applicable to the novel questions growing out of the peculiar enterprises in which many of the people of this state are embarked.<sup>1</sup>

In the case of Irwin against Phillips,<sup>2</sup> it was declared that the policy of this state, as indicated by her legislation, in conferring the privilege to work the mines, equally confers the right to divert the streams from their natural channels; that these two rights stand upon an equal footing, and must, when they conflict, be decided by the fact of priority; and that the miner who selects a piece of ground to work, must take it as he finds it at the time, subject to all previously acquired rights. The distinct question presented to the court to be passed upon in this case was, whether the proprietor of a ditch or canal in the mineral region of this state, constructed for the purpose of supplying water to miners, has the right to divert the water of a stream from its natural channel, as against the claims of those who, subsequent to the diversion, take up lands along the banks of the stream for the purpose of mining; the lands through which both the stream and the ditch pass being public lands, and there being no claim of private proprietorship.

In passing upon this question the court says in substance: It is insisted by the appellants that in this case the common law

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<sup>1</sup> See Butte Canal and Ditch Company v. Vaughan, October Term, 1859.

<sup>2</sup> 5 Cal. R. 140.

doctrine must be invoked, which prescribes that a watercourse must be allowed to flow in its natural channel. But upon an examination of the authorities which support that doctrine, it will be found to rest upon the fact of the individual rights of landed proprietors upon the stream.

In this case the lands are the property either of the state or of the United States.

The appellants had the right to mine where they pleased, throughout an extensive region, and they selected the bank of a stream from which the water had been already turned, for the purpose of supplying the mines at another point.

In this state the larger part of the territory consists of mineral lands, nearly the whole of which are the property of the public. A system has been permitted to grow up by the voluntary action and assent of the population, whose free and unrestrained occupation of the mineral region has been tacitly assented to by the general government, and heartily encouraged by the expressed legislative policy of the state. There are some things in this system which a universal sense of necessity and propriety have so firmly established that they have come to be looked upon as having the force and effect of "things adjudicated."

Among these the most important are, the right of miners to be protected in the possession of their selected localities, and the rights of those who, by prior appropriation, have taken the waters from their natural beds, and by costly artificial works have conducted them for miles over mountains and ravines, to supply the necessities of gold diggers, and without which the most important interests of the mineral region would remain without development.

The miner who selects a piece of ground to work, must take it as he finds it, subject to prior rights, which have an equal equity, on account of an equal recognition from the sovereign power. If it is upon a stream the waters of which have not been taken from their bed, they cannot be taken to his prejudice; but if they have been already diverted, and for as high, and legitimate a purpose as the one he seeks to accomplish, he has no right to complain, no right to interfere with the prior occupation of his neighbor, and must abide the disadvantage of his own selection.



A similar doctrine was laid down in the case of *Kelly against the National Water Co.*,<sup>1</sup> in which the court says: "Possession, or actual appropriation, must be the test of priority in all claims to the use of water, whenever such claims are not dependent upon the ownership of the land through which the water flows."

But where the owners of a ditch had commenced the same, and run their line, before the location and appropriation of a lot of land by the plaintiff, through whose lot the line ran, the latter having sued the ditch owners for trespass, it was held, that in constructing canals or ditches under the license of the state, the survey of the ground, planting stakes along the line, giving public notice, and actually commencing and diligently pursuing the work, is as much possession as the nature of the subject will admit, and is conclusive of the right to run the ditch on the line thus indicated.<sup>2</sup>

The state, by her general legislation, has granted a license for the construction of ditches, canals, and flumes, for the purpose of conducting water to be used in mining. From the very nature of these works, time is necessary to complete them, and the license would be valueless if the right did not commence until their completion. The right must therefore be so construed, that it may be effectual for the purposes for which it was granted.<sup>3</sup>

And generally, where a ditch is made for the purpose of using the water, the right thereto as against others, dates from the commencement of the work in good faith. But in all cases there must be an appropriation, or an intention to appropriate, followed by due diligence and an actual appropriation within a reasonable time. What is a reasonable time must depend upon the facts of each particular case.<sup>4</sup>

If, however, a ditch be cut for drainage merely, or for some other object than the appropriation and use of the water for mining, or some other useful purpose, and other parties in good faith commence a ditch with the intention of appropriating the water to the purposes last mentioned, the latter obtain a priority. And it would seem that the cutting of a ditch for a drain can give no priority.<sup>4</sup>

<sup>1</sup> 6 Cal. E. p. 105; and see *Kimball v. Gearhart*, January Term, 1859.

<sup>2</sup> *Conger v. Weaver*, 6 Cal. 548.

<sup>3</sup> *Maeris v. Bicknell*, 7 Cal. 261; *Park v. Kilham*, 8 Cal. 77.

<sup>4</sup> *Maeris v. Bicknell*, 7 Cal. 261.

Where a party suffers damage from the breaking of a canal constructed prior to the location of his claim, if there be no actual negligence on the part of the canal owners, or no other negligence than such as the law would presume from the mere breaking of the canal, the owners will not be responsible for such damage. The principle seems to be that one who chooses to locate his claim along the line of a ditch already established, does so at the risk of any accidental injury from the same, not caused by the actual neglect of the owners.<sup>1</sup>

He who has first located his mining claim on the bank of a stream has the right to use the bed of the stream for the purpose of fluming or working his claim, and any *subsequent* erection, dam, or embankment, which will turn the water back upon such claim, or hinder it from being worked with flumes or other necessary means or appliances, is an encroachment upon the rights of said first occupant, who is entitled to recover all damages consequent on such obstructions.<sup>2</sup>

The first appropriator of water for mining purposes is entitled to have the water flow without material interruption in its natural channel. And he is entitled to the water so undiminished in quantity as to leave sufficient to fill his ditch as it existed at the time of the subsequent appropriation of the stream above him. As to any deterioration in the quality of the water, by reason of being used for mining purposes, before it reaches the ditch of the prior locator, it would not seem to be such a damage as any recovery can be had for.<sup>3</sup>

And parties are not limited to the amount and quantity of water which they may have turned into their ditch in the first instance, unless, by its general size, plan, &c., it was incapable at the time of carrying more water than was at first appropriated. They may at any reasonable time afterward use more water, if necessary, in order to fill the ditch to its original capacity. But if they continue to use only the original quantity long enough to indicate that they intended to appropriate no more, they would be limited to that quantity.<sup>4</sup>

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<sup>1</sup> Tenney v. Miners' Ditch Co. 7 Cal. 385.

<sup>2</sup> Sims v. Smith, 7 Cal. R. 146.

<sup>3</sup> Bear River W. and M. Company v. York Mining Company, 8 Cal. 827.

<sup>4</sup> White v. Todd's Valley Water Co. 8 Cal. 443.

## IV.—MISCELLANEOUS MATTERS CONNECTED WITH THE GENERAL SUBJECT.

The sale and transfer of a mining claim, or water right, should be by deed under seal, the latter being a right running with the land, and, having none of the characteristics of a mere personality, must be conveyed with the same formalities as real estate. The question as to the sufficiency of a mere bill of sale to transfer a mining claim has been raised in several cases coming before the Supreme Court of this state, and though not specifically adjudicated, the opinion of the court seemed to be that a transfer by bill of sale was insufficient.<sup>1</sup>

The interest of a miner in his claim is property, and may be 'taken and sold under execution.' His pay dirt, and tailings, which are the productions of his labor, are in like manner his property.<sup>2</sup>

It would seem that school law warrants may be located upon any of the mineral lands in the state, the act of May 3, 1852, appearing to make no exception or reservation of mineral lands.<sup>3</sup>

To shut off a useful element from one's premises, is as much a nuisance as to turn upon them a destructive one; and a ditch to carry off water rightfully flowing to a mining claim, is as much a nuisance as a drain to flood it.<sup>4</sup>

Rights to the use of water become fixed, after five years' adverse enjoyment of the same.<sup>5</sup>

The owner of a ditch is bound to use that degree of care in its construction and management to prevent injury to others, which ordinarily prudent men use in similar instances, when the risk is their own; and the question of negligence must in a great measure depend upon the facts and circumstances of each particular case.<sup>6</sup>

In regard to the doctrine of fixtures upon public mineral lands, the Supreme Court held, in the case of *Merritt vs. Judd*, July term, 1859, that where machinery is erected upon a claim by a tenant, for the purpose of extracting the gold, and is necessary for that purpose, such machinery is considered as attached permanently to the soil, to aid in effecting the object for which it is

<sup>1</sup> *Hill v. Newman*, 5 Cal. R. 445; *McCarron v. O'Connell*, 7 Cal. R. 152.

<sup>2</sup> *McKeon v. Bisbee*, 9 Cal. R. 187.

<sup>3</sup> *Jones v. Jackson*, 9 Cal. R. 237.

<sup>4</sup> *Nims v. Johnson*, 7 Cal. R. 110.

<sup>5</sup> *Parke v. Kilham*, 8 Cal. 77.

<sup>6</sup> *Crandall v. Wood*, 8 Cal. 186.

<sup>7</sup> *Wolf v. St. Louis Water Co.* 10 Cal. 541.

valuable, and passes to the landlord as a fixture annexed to the freehold, if the tenant fails to remove it during the term; that these claims, having been regarded from an early period of our state jurisprudence as titles, are clearly entitled to the incidents of estates of freehold in respect to this matter.

**FORM.**

*Notice of Claim of Mining Land.*

**NOTICE (RENEWED.)**

The Mountain Brow Tunnel and Mining Company claim 1,600 feet of this ground for mining purposes, being at the rate of 100 feet per man, running from this in a northerly direction 320 feet to a pile of rock and a stake; from thence 500 feet in a westerly direction to a pile of rock and a stake; from thence 320 feet in a southerly direction to a pile of rock and a stake; from thence 500 feet in an easterly direction to this, the place of beginning.

Located April, 1855.

Table Mountain, Tuolumne County.

A. B.,

C. D.,

E. F.,

&c. &c.

*Another Form.*

**NOTICE.**

We, the undersigned, claim 1,200 feet of this ground for mining, this being the south-east corner.

Shaw's Flats, Nov. 18th, 1851.

A. B.,

C. D., &c., &c.

*Renewal Notice of Claim of Mining Lands.*

**NOTICE.**

December 1st, 1851.

This is to certify that the Ophir Company lays this ground over until the first day of May, by renewing the notice and names, and recording this ground under Shaw's Flat law.

The undersigned claim six hundred (600) feet of this ground.

J. T. GILLAM.

J. FALLS.

A. GOULD.

W. FLEECHART.

J. DONNELLA.

A. FLEECHART.

*Transfer of Mining Claim.*

State of California, }

Tuolumne County. }

Know all men by these presents, that we, the undersigned, a duly appointed and authorized committee, and president and sec-

retary of the Mountain Brow Tunnel Company, have, for and in consideration of the sum of one thousand dollars, to us in hand paid, the receipt whereof is hereby acknowledged, sold, transferred and quit-claimed unto I. R. Marston and Charles Wessel, members of the Crystal Spring Company, all our right, title and interest in and to the following-described mining grounds, situated in the county and state aforesaid, district of Table Mountain, located by said Mountain Brow Company in January, A. D. 1855, as per records of said mining district, and more particularly described as follows: commencing at the Mountain Brow saw-mill, thence running in a south-easterly direction, toward the diggings on Shaw's Flat, to a blazed oak-tree; thence down the mountain to a stake and stones, being the north-east corner of Mountain Brow claim; thence running westerly, following the north line of the Mountain Brow claim to the north-west corner of said Mountain Brow claim; thence southerly, following west line of Mountain Brow claim, to south-west corner of Mountain Brow claim; thence easterly, following south line of Mountain Brow claim, to a stake and stones, being the south-east corner of Mountain Brow claim, about twenty steps from a large pine-tree blazed on south side; thence running westerly across the mountain to an oak stump on Mormon Creek, being north-west corner of the Virginia Tunnel Company; from thence to the saw-mill, the place of beginning; or, in other words, we sell, transfer and quit-claim unto said Crystal Spring Company all the ground originally claimed by the Mountain Brow Company in January, 1855, with the exception of 1,600 feet located in the south-east corner of said claim, being 320 feet wide and 500 feet long, as per corners hereinbefore mentioned and designated, and herewith deliver full possession of said ground to said Crystal Spring Company.

In testimony whereof, we have hereunto set our hands and seals, this 20th April, A. D. 1857.

EUGENE B. DRAKE, [L. s.]

S. N. STRANAHAN, [L. s.]

Committee.

G. S. ELLIOTT, [L. s.]

President.

[L. s.] D. ROBERTSON, Secretary.

*Assignment of Mining Claim (commonly termed Bill of Sale).*

Henry Jackson having purchased my mining claim in the county of Tuolumne for two thousand dollars, which money he has paid me, I, Charles Grant, do hereby sell and transfer to him the said claim, which is described as follows: [*here insert description,*] together with all the tools and implements now being in the shanty erected thereon, and together with said shanty and all improvements and every species of property thereon. And I do

guarantee that I am the true owner of said claim, and that I hold and herewith transfer to said Henry Jackson full and undisputed possession thereof, and that in taking up, maintaining and working said claim I have complied in every respect with the mining rules, regulations and customs of the district.

Witness my hand and seal, August 9th, 1859.

CHAS. GRANT. [L. s.]

*Surety Bond to Perform Mining Contract.*

State of California, }  
Tuolumne County, } ss:

Know all men by these presents, that we, A. B., and C. D., of the Crystal Spring Mining Company, of the county and state aforesaid, are held and firmly bound unto E. F. *et. al.*, of the Mountain Brow Mining Company, of the same place, in the sum of ten thousand dollars (\$10,000), lawful money of the United States, to be paid to the said E. F. *et. al.*, their heirs, administrators or assigns, for which payment well and truly to be made we bind ourselves, our heirs, executors and administrators firmly by these presents.

Sealed with our seals, and dated this 20th of April, A. D. 1857.

The condition of the above obligation is such that if the above bounden A. B. and C. D. shall well, faithfully, fully and truly fulfil and execute the requirements and covenants of a certain article of agreement, made and entered into by and between the said A. B. and C. D., of the Crystal Spring Mining Company, a party of the second part, and the said E. F. *et. al.*, of the Mountain Brow Mining Company, a party of the first part, dated on the 20th day of April, A. D. 1857, and in which agreement this bond is hereunto referred and made a portion of said agreement, according to its tenor and meaning, then this obligation shall be null and void; otherwise to remain in full force and virtue.

In testimony whereof we have hereunto set our hands and seals this 20th day of April, A. D. 1857.

A. B. [L. s.]

C. D. [L. s.]

In consideration of the premises, and one dollar to me paid, I hereby bind myself as surety on the foregoing bond for A. B., this 20th day of April, A. D. 1857.

G. H.

In consideration of the premises, and one dollar to me paid, I hereby bind myself as surety for the foregoing bond for C. D., this 20th day of April, A. D. 1857.

J. K.

*Agreement of Indemnity.*

This article witnesses: Whereas, the Moquelumne Hill Canal and Mining Company have executed a mortgage on the canal, flumes, ditches, and the works, franchises, rights, interests and

hereditaments of whatever kind, of the said company, to A. B., as security for the payment of a certain promissory note for dollars, made by C. D. and Co., the lessees of the said works, &c., dated January, 1851, to said A. B. or his order, as in the said mortgage is fully set forth.

Therefore and in consideration of the sum of one dollar paid to the said C. D. and Co., by the said M. H. C. and M. Company, the said C. D. and Co. agree that they will immediately pay, satisfy and discharge all claims outstanding against the said company which are subsisting liens of judgment, attachment or otherwise, to the amount of        dollars, and will deliver to the president of the said company, at San Francisco, so paid, satisfied and discharged, or the evidences in due form of law, that the same have been so paid, satisfied and discharged.

The said C. D. and Co. further bind themselves and assigns to hold the said M. H. C. and M. Company harmless against all loss or liability, incurred or to be incurred by reason of the said mortgage, and all damages and liabilities incurred or to be incurred thereby; and they further agree, in case of default made by them in the payment of said note, principal or interest, according to its terms and tenor, so that if any liability is incurred by the said W. H. C. and M. Company, that it shall and may be lawful for the said company, within        days thereafter, to treat the lease from the company to C. D. and Co. as forfeited and determined (and the same shall thereby be forfeited and determined), and without further notice, to enter upon and take full possession of all the works, franchises, rights, interests and hereditaments of the said company, now held and enjoyed by C. D. and Co., and also of all ditches and works of every kind, constructed by the said C. D. and Co., and all franchises, rights and hereditaments thereto belonging:

This agreement shall not in anywise affect the covenants in said lease, for the payment of the sum of \$        a month, by said C. D. and Co., until the entire outstanding debt of the company is fully paid off and discharged: but the same shall remain in full force and effect, any thing in this agreement contained to the contrary notwithstanding.

In witness whereof, &c.

*Form of Foreign Miner's License.*

TO BE RENEWED UPON EXPIRATION OF TERM.	No.	No.	County, [date.]	TO BE RENEWED UPON EXPIRATION OF TERM.
	County, [date.]	This certifies that	has this	
	has paid four	day paid the sheriff of	county four	
	dollars mining license.	dollars, which entitles him to work in the mines of this	state for one month from date.	
which entitles him to	By        , Sheriff.	Controller of State.		
work in the mines one				
month.				

[Each subsequent license to be dated from the expiration of the former license.]

## FORMS OF MINING LAWS AND REGULATIONS.

*Mining Laws of Jacksonville.*

SECTION 1. All American citizens may locate and hold claims.

SEC. 2. The extent of a claim upon any bar of the river or bank of the same, or upon Wood's Creek, shall be fifty feet in width, running at right angles with the bed of the same from the centre of the stream, back to the adjacent mountain.

Upon any flat or plain, the size of a claim shall be one hundred and fifty feet to each share; and in any gulch or ravine, each person shall be entitled to hold three hundred feet of the same. In all claims which must be drained, either by ditching or fluming, sixty feet in length, running up and down the stream, and the width of the river to low-water mark.

SEC. 3. No person shall hold more than one claim, in a working condition, at the same time. The boundaries of all claims must be plainly marked by written notices, with the names of the parties attached, and all claims which are located, to be worked at any future time, shall be recorded in a book kept by a justice of the peace for that purpose, and all claims so located upon any flat or bar, or in any gulch or ravine, or in the bed of the river, shall be worked within fifteen days of the time such claim is in a workable condition. And all claims shall be worked at least one day in three after the expiration of the fifteen days, or they will be considered abandoned.

SEC. 4. No transfer or sale of a claim shall be considered valid unless such transfer is noted on the record.

SEC. 5. The justice of the peace shall receive one dollar for recording each claim, and fifty cents for recording or noting each transfer.

*Mining Laws of Tuttletown.*

At a meeting of the miners of Tuttletown, Tuolumne county, the following rules and by-laws were adopted:

Whereas, the Congress of the United States have in their wisdom made it incumbent on the miners of the various mining districts of California to provide such laws for the protection and regulation of mining claims as to them may seem right, just, and equitable for the greatest number, therefore, be it enacted by the miners of Jackson Flat and Tuttletown, to wit:

SECTION 1. That any person or persons entitled by the laws of the United States to hold a mining claim, may, either by pre-emption or purchase, hold one hundred feet square of ground.

SEC. 2. No person or persons shall, in locating a claim, if he or they take a less width than one hundred feet, extend the limits beyond one hundred feet in length.



SEC. 3. Any person or persons claiming ground, either by pre-emption or purchase, who does not within six days from the time such claim is in workable order, either work, or cause the same to be worked, shall forfeit his or their right to the same.

SEC. 4. Claims shall be signalized by stakes firmly set in the ground, with notices, or by notices placed upon trees or other objects sufficiently firm.

SEC. 5. Any person or persons who shall be convicted of destroying or pulling down any notice or stake, or both, which are the signs of a legitimate claim, shall be liable to a fine of not less than five dollars, nor more than fifty dollars, as in the discretion of the court or jury may seem proper.

SEC. 6. Where more than one person is associated in any claim, the name of each individual of such company shall be legibly written upon the notice, and no more ground shall be deemed taken than there are names upon the notice.

SEC. 7. All mining laws heretofore in existence, either at Jackson Flat or Tuttletown, are hereby repealed, and we, the miners, do solemnly swear and pledge ourselves, mutually and individually, to abide by and support the foregoing by-laws.

SEC. 8. No person shall hold more than two claims at the same time, either by purchase or otherwise, any thing in the first section to the contrary notwithstanding.

SEC. 9. Any person disabled by illness for any length of time shall not lose his right in consequence of not working the same during such illness.

SEC. 10. All persons having notices upon dry claims must renew the same every thirty days from date, or otherwise they become void.

SEC. 11. These by-laws shall take effect from and after November 13, 1855.

JOHN A. BRONSON, President.

HENRY WELLINGTON, Secretary.

### *Mining Laws of Springfield District.*

Adopted at a mass meeting, April 13, 1852; revised, August 11, 1852, by a mass meeting; and again revised December 22, 1854, by a mass meeting of the miners of Springfield mining district.

#### BOUNDS OF SPRINGFIELD MINING DISTRICT.

Commencing at a spring above and near Yarney's steam saw-mill, the line running from thence, in a westerly direction, to the north side of McKennie's old store, thence to Wm. Cox & Co.'s cabin on French Gulch, thence to a spring at the head of Dead Man's Gulch, thence, following said gulch, to the Stanislaus River, thence down the river to Horse-Shoe Bend, thence in an easterly

direction to Mormon Creek, intersecting it one hundred feet above the Illinois House, thence up the creek to Saw-Pit Gulch, thence up Saw-Pit Gulch to the Sullivan Creek Water Company's reservoir, thence, in a straight line, to the spring, the place of commencement.

*Resolved*, That California is, and shall be, governed by American principles; and, as Congress has made no rules and regulations for the government of the mining districts of the same, and, as the state legislature of California has provided by statute, and accorded to the miners of the United States, the right of making all laws, rules, and regulations that do not conflict with the constitution and laws of California, "in all actions respecting 'mining claims:'"

*Resolved, therefore*, That we, the miners of Springfield mining district, do ordain and establish the following

#### RULES AND REGULATIONS.

ARTICLE 1. A claim for mining purposes, within the district, shall not exceed one hundred feet square to each man, nor be more than one hundred feet in length.

ART. 2. That no man within the bounds of this district shall hold more than one workable claim.

ART. 3. That each and every man within the bounds of this district shall perform actual labor upon such claim one day out of every three, or employ a substitute, otherwise such claim shall be forfeited: *provided*, that claims on dry gulches, or other places, that can be worked advantageously only by water brought by water companies, &c., shall be good till water is brought in: *provided, also*, that wet claims, and carting claims, not workable in the rainy season, shall be good also, without working, from the fifteenth of November to the fifteenth of May.

ART. 4. The bounds of claims shall be established and defined by putting up good and substantial stakes at each corner, and recording the description of the lot in the books of the precinct registry, and by putting up one notice at each end of a claim, signed by each person or individual of a company, and the names of the several persons holding such claim shall be signed in their own handwriting in the book of registry.

ART. 5. When two or more claims join together and are worked by companies, such companies can work any portion of such claims as they may deem expedient, complying with Article 3.

ART. 6. Disputes concerning claims shall be settled by referring the same to a standing committee of five, or by arbitration, or by jury. The standing committee shall, each member who may arbitrate upon a case, be paid two dollars for such service.

Art. 7. That the foreman of any jury, or committee of arbitration, shall be sworn to do his duty faithfully and impartially, by some justice of the peace, notary public, or other qualified officer to do the same: *provided*, such officer be hereafter appointed in this mining district. And shall thereafter administer a like oath to each of his associates in each and every case tried; and an oath to the witnesses who shall be offered to give evidence in such case, under like proviso of such qualified officer being appointed.

Art. 8. That the decision in all such cases shall be conclusive and binding upon the parties thereto, and be deemed and considered final in all such cases. And either party may compel the other to come to trial, by giving a notice to the other of the time and place of trial three days previous to the same.

Art. 9. That costs in all such cases (so far as they are taxed) shall be paid in the same manner as in magistrates' courts.

Art. 10. That all water claims or privileges for washing, in dispute, shall be settled according to the above mining rules, and be considered good as long as the apparatus and furniture of the same are kept in good order and repair: *provided*, however, that if such claims be deserted in the working season of carting claims, for thirty days, they shall be forfeited.

Art. 11. That no law passed by the miners of this district shall be considered retroactive.

Art. 12. That in case of sickness, no miner shall forfeit his claim.

Art. 13. That no person not an American citizen, or where there is a reasonable doubt of his being entitled to the privileges of an American citizen, shall be competent to act on any arbitration or trial by jury.

Art. 14. That all companies going to great expense in running tunnels in order to prospect the hills, shall be entitled to two claims each person of a company.

Art. 15. That a recorder of this mining district shall be chosen, and shall be paid fifty cents for recording the title of each mining claim. The recorder shall have the custody of the books, laws, and proceedings of this mining district.

Art. 16. That all foreigners subject to pay a foreign miner's tax, when called upon to show their license, who cannot or will not do the same, shall not be permitted to hold a claim in this mining district; and any such claim purporting to be held by him or them, shall be forfeited.

JUBAL HARRINGTON, President.

J. W. GLASS, Secretary.

At a meeting of the miners of this district, held January 20, 1855, the following laws respecting tunnelling claims were adopted:

ART. 17. One hundred feet along the base, and running from base to base through the mountain, shall constitute a tunnelling claim to this mining district, and no miner shall hold more than one tunnelling claim, in addition to the other claims already provided for by the mining laws of this district.

ART. 18. And each tunnelling company may work its claim by employing such number of persons to work upon the same as it may deem expedient.

ART. 19. And no such claim shall be considered forfeited until thirty days after its abandonment.

JUBAL HARRINGTON, President.

E. DAY, Secretary.

*Chattel Mortgage by a Water-right Company*

Whereas, the following-named persons and firms are interested in, and claim to be the owners of a water-ditch or canal, and appurtenances, known as the ditch or canal of the Middle Yuba Canal and Water Company, in the proportions or number of shares set opposite the name of each, and who reside at the places, and follow the profession, trade or occupation set opposite the name of each, the whole ownership thereof being divided into one thousand shares, viz.:

Names of Shareholders or Owners.	Number of Shares owned by each.	Residence of Shareholders or Owners.	Occupation, Trade or Profession.
Jones & Brown . .	497	San Juan, Nevada Co. Present residence of D. Jones, one of said firm, State of Wisconsin.	Merchants.
Richard Holmes . .	60	San Juan, Nevada Co.	Banker.
James Miller . .	15	Mazinto Hill, Nevada Co.	Miner.
&c.	&c.	&c.	&c.

And whereas such ditch or canal was built and constructed under and in pursuance of an agreement, or articles of association, called constitution and by-laws, a copy whereof is hereto annexed, marked A., and is owned and possessed in pursuance thereof. And whereas, such ditch or canal is situate and located in the county of Nevada, and state of California, and is particu-

larly designated and delineated on a map or plate hereto annexed, marked B.

And whereas, there has been heretofore borrowed of M. Johnson & Co. (to wit: Martin Johnson, now deceased, and Henry Pearce, of the city of San Francisco) the sum of forty thousand dollars, which sum has been expended in constructing and keeping in repair said canal or ditch. And whereas, there is now due to said Henry Pearce, surviving partner of M. Johnson & Co., on account of said loan, the sum of nine thousand eight hundred and twenty dollars and thirty-nine cents. And whereas, for the purpose of completing the construction of such canal or ditch, and of paying certain floating and outstanding debts, owing by the Middle Yuba Canal and Water Company, and incurred in constructing and carrying on such canal or ditch, it has become and is necessary to raise, by loan, the further sum of twenty thousand dollars.

And whereas, at a meeting of the shareholders of said company and owners of said canal or ditch, on the 7th day of February, 1858, pursuant to said constitution and by-laws, or articles of association, it was voted and resolved that the Middle Yuba Canal and Water Company will raise, by loan, to be secured by mortgage upon the ditch or canal and waterworks of said company, the sum of twenty thousand dollars, to bear a rate of interest not exceeding three per cent. per month, payable quarterly, and if not paid when due, to be compounded with, and added to the principal, and thereafter to form a new principal, and bear the same rate of interest until paid.

And whereas, at said meeting it was also voted and resolved, that if the said Henry Pearce, surviving partner aforesaid, will and has consented to postpone the payment of said sum or loan due to him as aforesaid, that the Middle Yuba Canal and Water Company would secure the payment thereof by mortgage upon said ditch, canal, or waterworks, to bear a rate of interest of three per cent. per month, payable quarterly, and if not paid when due, to be compounded with and added to the principal, and thereafter to form a new principal, and bear the same rate of interest until paid.

And whereas, at said meeting it was also voted and resolved, that the president and trustees of the Middle Yuba Canal and Water Company be authorized, empowered and instructed to negotiate for and procure such loan, and such postponement, and for and on behalf of the said company, to execute and deliver a mortgage or mortgages upon the ditch or canal and waterworks of said company, with the appurtenances, to secure the payment of said loans and sums of money and interest as above specified.

Now therefore, this indenture, made the                      day of February, (1858) eighteen hundred and fifty-eight, by and between

the Middle Yuba Canal & Water Co., of Nevada, Nevada county, California, a company for mining, chemical, or agricultural purposes, and furnishing and selling water for such purposes, and each of the firms and persons subscribing this indenture, whose residences, trades, professions and occupations are hereinbefore set forth, shareholders in and part owners of said ditch or canal and waterworks, parties of the first part, and Henry Pearce, party of the second part, witnesseth, that the said parties of the first part, as a company and individually, for and in consideration of the premises, and in consideration of the sum of lent and advanced by the party of the second part to the parties of the first, the receipt whereof is hereby confessed and acknowledged, and in further consideration of the postponement by said Pearce of the payment of said sum so due and owing to him, hath sold, granted, conveyed and mortgaged, and by these presents doth sell, grant, convey and mortgage unto the said party of the second part, all the right, title, interest, claim and property of the said parties of the first part, as a company, members of firms and individually, of, in and to the ditch, or canal and waterworks, reservoirs and rights of water, including dams, sluices, gates, trunks and branches belonging and pertaining to the Middle Yuba Canal and Water Co., as the same is more particularly designated and delineated on the map or plot marked B., hereto annexed, and forming part of this instrument.

This grant and instrument is intended as security for the payment of the said sum of twenty thousand dollars in one year from date, with interest at three per cent. per month, payable monthly, and if not paid when due, to be added to the principal, and compounded, and bear the same rate of interest; which payments of principal and interest, at the times and in the manner above mentioned, at the banking house of Banks & Bull, in the city and county of San Francisco, will render this conveyance and instrument void: but in case default be made in the payment of the principal or interest above mentioned, or any part, at the time, place, and in the manner above mentioned, then the said party of the second part is hereby authorized and empowered to sell the property hereinbefore mentioned, to wit: said ditch, or canal and waterworks, with the appurtenances and every part and parcel thereof, in the manner provided by law, and under and in pursuance of a decree of a court of competent jurisdiction, and out of the moneys arising from such sale, to retain two and one-half per cent. upon the amount then due and unpaid and to grow due, for attorney and counsel fees of foreclosure, together with the legal costs and charges of making such sale, the said principal sum and interest thereon then unpaid and owing; and the overplus, if any there be, shall be paid to the Middle Yuba Canal & Water Company.

And the said Middle Yuba Canal and Water Company covenant, promise and agree, to and with the party of the second part, to pay to him the said principal sum and interest, as above specified, at the time, place, and in the manner above mentioned.

And the undersigned firms and individuals covenant, promise and agree, to and with the party of the second part, to pay to him the said principal sum and interest as above specified, at the time, place, and in the manner above mentioned.

In witness whereof, &c.

For mode of executing this instrument, see statutory provisions and forms under the title **CHATTEL MORTGAGE**.

## CHAPTER XXX.

## MORTGAGE.

No particular form of words is necessary to constitute a mortgage; and where two instruments taken together, described the property, and the amount of indebtedness, and conveyed the premises as security for the indebtedness, they were held to constitute a sufficient mortgage.<sup>1</sup>

It is not necessary, to constitute a mortgage, that it should appear upon the face of the papers, that there was any personal obligation on the part of the mortgagor to pay the amount of the principal and interest. Such obligation would only enable the mortgagee to look to the mortgagor for any deficiency remaining after the application of the proceeds of sale of the premises to the payment of the sum secured.<sup>2</sup>

A claim against the estate of a deceased person, although secured by mortgage, must be presented to the executor or administrator, with the necessary affidavit, or suit cannot be maintained for its recovery.<sup>3</sup>

See title EXECUTORS AND ADMINISTRATORS.\*

A mortgage given upon a homestead, will not avail as a lien, to the extent of the homestead exemption—five thousand dollars—unless the wife join in the execution of the instrument.<sup>4</sup>

See titles HOMESTEAD AND ACKNOWLEDGMENTS. She should also join with her husband in a mortgage of her separate estate—see title HUSBAND AND WIFE.

A mortgage of real property shall not be deemed a conveyance, whatever its terms, so as to enable the owner of the mortgage to recover possession of the real property, without a foreclosure and sale.<sup>5</sup>

The court may, by injunction, on good cause shown, restrain

<sup>1</sup> 1 Cal. 308.

<sup>2</sup> 10 id. 197.

<sup>3</sup> 6 id. 396; 9 id. 122.

<sup>4</sup> 6 id. 304; 8 id. 66; 10 id. 204.

<sup>5</sup> Wood's Dig. art. 994, 995.



the party in possession from doing any act to the injury of real property during the foreclosure of a mortgage thereon; or after a sale on execution, before a conveyance.<sup>1</sup>

In an action for the foreclosure or satisfaction of a mortgage of real property, or the satisfaction of a lien or incumbrance upon property, real or personal, the court shall have power by its judgment to direct a sale of the property, or any part of it, the application of the proceeds to the payment of the amount due on the mortgage, lien or incumbrance, with costs, and execution for the balance.<sup>2</sup>

If there be surplus money remaining after the payment of the amount due on the mortgage, lien or incumbrance, with costs, the court may cause the same to be paid to the person entitled to it, and in the mean time may direct it to be deposited in court.<sup>3</sup>

If the debt for which the mortgage, lien or incumbrance is held be not all due, so soon as sufficient of the property has been sold to pay the amount due, with costs, the sale shall cease: and afterward, as often as more becomes due, for principal or interest, the court may, on motion, order more to be sold. But if the property cannot be sold in portions without injury to the parties, the whole may be ordered to be sold in the first instance, and the entire debt and costs paid, there being a rebate of interest where such rebate is proper.<sup>4</sup>

A mortgage is a mere incident to the debt which it secures, and follows the transfer of the note, or other evidence of debt, with the full effect of a regular assignment. And if the mortgage be given to secure two notes, the endorsement and delivery of one of the notes carries with it a *pro rata* portion of the security.<sup>5</sup>

A conveyance and an attendant agreement for a reconveyance upon the payment of the amount of the consideration and interest, do not of themselves in the absence of other circumstances, create a mortgage, but only a defeasible purchase, which should be narrowly watched lest it may be made the means of converting what was in fact intended as a security, into an absolute purchase. Slight circumstances will determine the transac-

<sup>1</sup> 5 Wood's Dig. art. 994, 995.  
<sup>2</sup> id 98-993.

<sup>3</sup> 6 Cal. 478; 9 id. 965, 484.

tion to be one of mortgage, when that can be done without violence to the understanding of the parties.<sup>1</sup>

It has been held by the Supreme Court of California, that a deed absolute on its face cannot be shown by parol testimony to be intended as a mortgage, except in cases of fraud, accident or mistake in the creation of the instrument itself. This doctrine has been recently overruled and the old doctrine restored, in the case of *Pierce vs. Robinson*, administrator, in which case Judge Field decides as follows :

"I consider parol evidence admissible in equity, to show that a deed absolute upon its face was intended as a mortgage, and that the restriction of the evidence to cases of fraud, accident or mistake, in the creation of the instrument, is unsound in principle, and unsupported by authority.

"The entire doctrine of equity, in respect to mortgages, has its origin in considerations independent of the terms in which the instruments are drawn. In form, a mortgage in fee is a conveyance of a conditional estate, which, by the strict rules of the common law, became absolute upon breach of its conditions. But, from an early period in the history of English jurisprudence, courts of equity interposed to prevent a forfeiture of the estate, and gave to the mortgagor a right to redeem, upon payment within a reasonable time, of the principal sum secured, interest and cost. As the right to thus recover the estate forfeited arose, not from the terms of the instrument, but from a consideration of the real character of the transaction, as one of security and not of purchase, it could be enforced only in equity, and was hence termed an equity of redemption. And when the right to redeem had been once established, to prevent its evasion the rule was laid down, and has ever since been inflexibly adhered to, that the right is inseparably connected with the mortgage, and cannot be abandoned or waived by any stipulations entered into between the parties at the time, whether inserted in the instrument or not."

The original character of mortgages has undergone a change. They have ceased to be conveyances except in form. They are no longer understood as contracts of purchase and sale between

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<sup>1</sup> 10 Cal. 684.

the parties, but as transactions by which a loan is made on the one side, and security for its repayment furnished on the other. They pass no estate in the lands, but are mere securities; and default in the payment of the money secured does not change their character.<sup>1</sup>

Proceedings for the foreclosure of mortgages, in the sense in which the terms are used in England and in several of the states, by which the mortgagor, after default, is called upon to repay the loan by a specified day, or be forever barred of his equity of redemption, are unknown to our law. The owner of the mortgage in this state can in no case become the owner of the mortgaged premises, except by purchase upon sale under judicial decree, consummated by conveyance.<sup>1</sup>

A foreclosure suit, by our law, results only in a legal ascertainment of the amount due, and a decree directing the sale of the premises for its satisfaction, the surplus, if any, going to subsequent incumbrancers, or the owner of the premises, and execution following for any deficiency.<sup>1</sup>

The statutory right of redemption is equally applicable to sales under decrees in mortgage cases as to sales under ordinary judgments at law.<sup>1</sup>

The estate of a mortgagor and of a judgment debtor after sale, stand upon the same footing, and the insertion in the decree of a clause foreclosing the equity of redemption, is a useless formula, which cannot enlarge the effect of the decree, or any rights of the mortgagee under it.<sup>1</sup>

The decisions as to the estate of the judgment debtor after sale, become, therefore, authorities for determining the estate of the mortgagor after sale under the decree; and from them it will be found that the estate must remain in the mortgagor until a consummation of the sale by conveyance, as it does in the judgment debtor, and that the conveyance when executed will take effect, in the one case, from the date of the mortgage, as it does in the other, from the time the lien of the judgment attached.<sup>1</sup>

It follows that a creditor of the mortgagor obtaining a judgment after sale under the decree of foreclosure, but before the

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<sup>1</sup> *McMillan v. Richards*, 9 Cal. 365.

execution of the conveyance thereunder, acquires a lien on the estate entitling him to redeem.<sup>1</sup>

Possession by the mortgagee cannot abridge, enlarge, or otherwise affect his interest, nor convert that which was previously a security into a seizin of the freehold.<sup>2</sup>

If the mortgage confers no right of possession, entry under it can give none. It does not change the relation of debtor and creditor, or impair the estate of the mortgagor, but leaves the parties exactly as they stood previous to such possession.<sup>3</sup>

The title of a purchaser under a sale on a decree of foreclosure cannot be impeached, in a collateral action, for irregularity in the proceedings on the sale.<sup>4</sup>

A mortgagee who is also a trustee is as strictly bound to execute his trust faithfully as he would be were he not a creditor, but acting for the benefit of another cestui que trust.<sup>5</sup>

#### FORMS.

##### *Mortgage—Short Form.*

Know all men that I, Horace Joke, being indebted to Milo Bluff in the sum of five hundred dollars, to be paid in three months from this date, with interest at two per cent. per month, for which he holds my promissory note, in consideration of one dollar paid to me by said Milo Bluff, and as security for the payment of said note, do hereby grant, bargain, and sell to said Milo Bluff, his heirs and assigns forever, the following lot of land in the city and county of San Francisco: [*here insert description,*] on condition that if the said debt be paid according to the terms of said promissory note, then these presents shall be void.

Witness my hand and seal this tenth day of June, one thousand eight hundred and fifty-nine.

HORACE JOKE. [L. S.]

Sealed and delivered }  
in presence of }

##### *Mortgage, without Bond, Note, or other Accompanying Instrument.*

This indenture, made this first day of May, in the year of our Lord one thousand eight hundred and fifty-eight, between A. B. and C. D., of \_\_\_\_\_, parties of the first part, and E. F., party of the second part, witnesseth, that the said parties of the first

<sup>1</sup> McMillan v. Richards, 9 Cal. 365.

<sup>2</sup> Id. 343.

<sup>3</sup> 9 Cal. 426.

part, for and in consideration of the sum of two thousand dollars to them in hand paid by the said party of the second part, do hereby grant, bargain, sell and confirm, unto the said party of the second part, and to his heirs and assigns forever, all [*here insert description*], together with all and singular the tenements, hereditaments and appurtenances thereunto belonging, or in anywise appertaining.

To have and to hold, unto the said party of the second part, his heirs and assigns forever, by way of mortgage, to secure the payment of the sum of two thousand dollars, payable by said parties of the first part to said party of the second part in three months from this date, with interest thereon at two per cent. per month, and these presents shall be void if such payment be made. But in case default be made in the payment of either the principal or any instalment of interest, as provided, then the whole sum of principal and interest shall be due at the option of the party of the second part, and suit may be immediately brought and a decree be had to sell the premises, above described, with all and every of the appurtenances, or any part thereof, in the manner prescribed by law, and out of the money arising from such sale to retain the said principal and interest, although the time for payment of said principal sum may not have expired, together with the costs and charges of making such sale, and of suit for foreclosure, including counsel fees at the rate of ten per cent. upon the amount which may be found to be due for principal and interest by the said decree, and the overplus, if any there be, shall be paid by the party making such sale, on demand, to the parties of the first part, their heirs and assigns.

In witness whereof, the said parties of the first part have here unto set their hands and seals the day and year first above written.

A. B.  
C. D.

Signed, sealed and delivered }  
in the presence of M. N. }

*Mortgage on Note, with full Conditions.*

This indenture, made the 3d day of June, one thousand eight hundred and fifty-nine, between George Happ, of the county of Alameda, party of the first part, and Loren Burke, of San Francisco, party of the second part. Whereas the said George Happ is justly indebted to the said party of the second part, in the sum of twenty thousand dollars, lawful money of the United States, secured to be paid by his certain promissory note, bearing even date with these presents, and which said note is in the words and figures following:

\$20,000.

San Francisco, June 8d, 1859.

For value received, I promise to pay to Loren Burke, or order, in twelve months from date, the sum of twenty thousand dollars, with interest thereon at the rate of one per cent. per month, payable monthly in advance, on that day of each and every month corresponding with the date of this obligation: all sums of principal and interest due and to grow due hereon, to be paid at the banking-house of John Sime & Co., in the city of San Francisco, without grace. And should the interest hereafter to grow due on this obligation, or any part thereof, be in arrear and unpaid for the space of fifteen days after the same should have been paid, as above provided, then it shall be lawful for the said payee, or for the holder hereof, to consider the whole amount of the said principal sum which shall then be unpaid, as immediately due and payable, with interest thereon as aforesaid, although the period above expressed for the payment thereof shall not have arrived, and to commence suit for the recovery of the same. And, if any part of the said interest shall not be paid when the same becomes due, then the holder hereof may add the same to the principal sum, and it shall thereupon become a part of said principal, and bear monthly interest at the same rate; and so on from month to month, adding all interest in arrear to such principal, and compounding interest on interest, at the same rate, and making monthly rests on that day of each month corresponding to the date of this obligation. And, in case a cause of action shall accrue on this obligation, and the payee, or the holder hereof shall commence a suit to enforce the same, then it shall be lawful for the said payee, or for the holder hereof, to have and demand upon the same, five per cent. upon the amount then due, or which shall be recovered thereon, as a reasonable indemnity for the trouble, risk, delay, and extraordinary expenses of litigation, in addition to the taxed costs of suit; and in case of judgment in decree, said percentage shall be included therein, and bear interest at the same rate, and in the same manner as the principal debt.

GEORGE HAPP,  
as by the said promissory note, reference being thereunto had, may more fully appear.

Now, this indenture witnesseth, that the said party of the first part, for the better securing the payment of the said sum of money secured to be paid by the said promissory note, with interest thereon, according to the true intent and meaning thereof, and also for and in consideration of the sum of one dollar, to him in hand paid by the said party of the second part, at or before the enrolling and delivery of these presents, the receipt whereof is hereby acknowledged, has granted, bargained, sold, aliened, released, conveyed and confirmed, and by these presents does grant, bargain, sell, alien, release, convey and confirm unto the

said party of the second part, and to his heirs and assigns, forever, all those certain tracts of land &c. [*here insert description*], together with all and singular, the tenements, hereditaments and appurtenances thereunto belonging, or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof: and, also, all the estate, right, title, interest, property, possession, claim and demand whatsoever, as well in law as in equity, of the said party of the first part, of, in, and to the same, and every part and parcel thereof, with the appurtenances. To have and to hold, the above granted and described premises, with the appurtenances, unto the said party of the second part, his heirs and assigns, to his and their own proper use, benefit and behoof, forever. Provided, always, and these presents are upon this expresse condition, that if the said party of the first part, his heirs, executors, or administrators, shall well and truly pay unto the said party of the second part, his executors, administrators or assigns, the said sum of money secured to be paid by the said promissory note, and the interest thereon, at the time and place, and in the manner mentioned in the promissory note, according to the true intent and meaning thereof, that then these presents, and the estate hereby granted, shall cease, determine, and be void. And the said party of the first part, for himself, his heirs, executors and administrators, does covenant, promise and agree, to and with the said party of the second part, his heirs, executors, administrators and assigns, that he has not made, done, committed, executed, or suffered any act or acts, thing or things, whatsoever, whereby, or by means thereof, the above mentioned and described premises, or any part or parcel thereof, now are, or at any time hereafter shall or may be impeached, charged or encumbered in any way or manner whatsoever. And, the said party of the first part, for himself, his heirs, executors and administrators, does covenant and agree to pay unto the said party of the second part, his executors, administrators or assigns, the said sum of money, and interest, as mentioned above, and secured to be paid as aforesaid. And, if default shall be made in the payment of the said sum of money, above mentioned, or if the interest that may grow due thereon, or any part thereof, shall be behind and unpaid for the space of fifteen days after the same should have been paid according to the terms of said promissory note, that then and from thenceforth it shall be lawful for the said party of the second part, his executors, administrators and assigns, to consider the whole of said principal sum expressed in said note, as immediately due and payable, although the time expressed in said note for the payment thereof shall not have arrived, and immediately to enter into and upon all and singular the premises hereby granted, or intended so to be, and to sell and dispose of the same, and all bene-

fit and equity of redemption of the said party of the first part, his heirs, executors, administrators or assigns, according to law: and in the mean time until such sale shall be made and become absolute, to enter into actual possession of the said mortgaged premises, applying to his own use the profits thereof, or to demand, collect and receive from any tenant in possession the rents of said mortgaged premises from them respectively due and payable, to which effect the said rents are hereby assigned to the said party of the second part; and to demand, collect and receive the same as aforesaid, he is hereby constituted the true and lawful attorney in fact, irrevocable of the said party of the first part, and out of the moneys arising from such sale, or rents and profits collected or received, if any, to retain the principal and interest which shall then be due on the said promissory note, together with the costs and charges of foreclosure suit; and also a percentage at the rate of five per cent. upon the amount of judgment recovered, as an indemnity, as provided in said note, and also, the amount of all such payments of taxes, assessments or incumbrances, as may have been made by said party of the second part, his heirs, executors, administrators or assigns, by reason of the permission hereinafter given, with the interest on the same hereinafter allowed, rendering the overplus of the purchase-money (if any there shall be) unto the said party of the first part, his heirs, executors, administrators or assigns. And it is hereby agreed, that it shall be lawful for the said party of the second part, his heirs, executors, administrators or assigns, to pay and discharge at maturity, all such taxes or assessments, liens, or other incumbrances now subsisting or hereinafter to be laid or imposed upon said land and premises above described, and which may be in effect a prior charge thereupon to these presents, and for such payments shall be allowed interest at the rate of two per cent. per month, such payments and interests shall be considered as secured by these presents, and a charge upon the land and premises hereby conveyed or intended to be, and shall be repayable on demand, and may be deducted from the proceeds of the sale above authorized. And the said party of the first part further covenants and agrees to and with the said party of the second part, to pay all ordinary taxes which shall or may be imposed upon said land and premises, and upon this mortgage or the money hereby secured during its continuance, and in default thereof, the said party of the second part shall pay and discharge the same; and the sum so paid shall bear interest at the rate of two per cent. per month, and shall be considered as secured by these presents, and be a lien upon said premises, and shall be deducted from the proceeds of the sale thereof, above mentioned, with interest as herein provided: and upon all sums which shall become due, or accrue to the said party of the second part, his



heirs, executors, administrators, or assigns, by virtue of any of the covenant or provisions herein contained, interest shall be chargeable at the same monthly rate as upon the said principal debt, up to the next monthly date corresponding to the date of the said promissory note or obligation, and then be added to the principal debt, and become a part thereof, and bear monthly interest at the same rate, and be compounded in the same manner, and subject to the recovery of the same percentage, and to be included in the judgment and decree in the same manner as the sums remaining due for principal or interest upon the said principal debt.

In witness whereof, the party of the first part has hereunto set his hand and seal the day and year first above written.

Signed, sealed in presence of and delivered

GEORGE HAPP. [L. s.]

#### *Satisfaction of Mortgage.*

Know all men by these presents, that I, A. B., resident of Bidwell city, do hereby certify and declare that a certain mortgage, bearing date the 4th day of March, 1854, made and executed by C. D., the party of the first part therein, to L. M., the party of the second part therein, upon a lot on the corner of Broadway and Duke street, in said city, which mortgage is recorded in the office of the county recorder of the county of Colusi, in book 3 of mortgages, on pages 24 and 25, on the sixth day of March, 1859, is fully paid, satisfied and discharged.

In witness whereof I have hereunto set my hand and seal, the 10th day of June, A. D. 1859. A. B.

In presence of P. Q.

#### *Mortgage by Way of Indemnity.*

This indenture, made this                      day of                      , A. D.                      , between A., of the city and county of San Francisco, state of California, and B., of the city of Boston, state of Massachusetts, of the first part, and C., of the said city and county of San Francisco, state of California, of the second part, witnesses:

That the said A. and B., parties of the first part, as collateral security to said C. for our full performance of the covenant of indemnification hereinafter expressed, and according to the condition of this deed, and in farther consideration of the sum of one dollar to us paid by said C., the receipt whereof is hereby acknowledged, have granted, bargained, sold and conveyed, and by these presents do grant, bargain, sell and convey unto the said C., his heirs and assigns, forever, all our right, title and interest (being the one undivided half thereof), of, in and to all those two certain lots, pieces or parcels of land, situated, lying and being

in said city of San Francisco, bounded and described as follows : [description of parcels] together with all and singular the tenements, hereditaments and appurtenances thereunto respectively belonging, to have and to hold the same to the said C., his heirs and assigns forever :

Provided always, nevertheless, whereas the said C., together with one D., on the                      day of                      , A. D.                      , did enter into and execute a certain stipulation in admiralty, in the suit of E. vs. the ship Star of the West, and of other libellants against the same ship, in the District Court of the United States, for the northern district of California, the total penalty whereof is the sum of \$                      , and the said C., being bound in the sum or proportion of \$                      , for the release from the custody of the United States marshal, of said ship Star of the West, and her delivery to F., the master and claimant thereof, conditioned that the said stipulators shall, at any time, upon the interlocutory and final order or decree of the said District Court, or of any appellate court to which the above-mentioned suits, or any of them, may proceed, and upon notice of such order or decree to said claimant, or to                      , his proctor, pay into court the full value of \$                      (the agreed value of said ship), in the several amounts specified in said stipulation, and abide by and pay, to the extent of said \$                      , in the several amounts in said stipulation mentioned, the money awarded by any final decree rendered in said suits by said District Court or the appellate court, if any appeal intervene:

Now these presents are on this condition, that if the said A. and B., their heirs, executors or administrators, shall indemnify and save harmless the said C., his heirs, executors or administrators, against said stipulation, and from all damages whatsoever that may happen or accrue to the said C., his heirs, executors or administrators, by reason of his having entered into and executed said stipulation, and of his or their being obliged, by compulsion of law, to pay, and in fact paying, any sum or sums of money by reason thereof, then this indenture and every thing herein contained, shall be wholly void, otherwise to remain in full force :

And the said A. and B., for themselves, their heirs, executors and administrators, jointly hereby covenant with the said C. his heirs, executors and administrators, that they the said A. and B. shall and will indemnify and save harmless, the said C., his heirs, executors and administrators, against said stipulation, and from all damages whatsoever, that may happen or accrue to the said C., his heirs, executors, or administrators, by reason of his having entered into and executed said stipulation, and of his or their being obliged to pay, and in fact paying, any sum or sums of money by reason thereof ;

And the said C., for himself, his heirs, executors, administra-

tors and assigns, doth covenant, that whenever his liability, or said stipulation, shall cease and determine by a decree of the said District Court in favor of the said claimant, or in any other manner, the said C., his heirs, executors, administrators or assigns, shall and will deliver up this indenture to the said parties of the first part, to be cancelled, or shall and will execute and deliver to them a good and valid release thereof.

In witness whereof, &c., &c., [*as in foregoing form.*]

*Release of Part of Mortgaged Premises.*

This indenture made this nineteenth day of December, 1857, between Major Thomas Harper, of the city of New York, of the first part, and Worthington S. Lyon, of the city of San Francisco, of the second part, witnesseth: that whereas the said party of the second part by his certain indenture of mortgage, bearing date the 15th day of September, 1856, and recorded in the county recorder's office, of the county of San Francisco, in liber No. 22 of mortgages, at page 129, September 18th, 1856, did, for the consideration and for the purpose therein mentioned, convey to the party hereto of the first part, certain lands in the city and county of San Francisco, of which the lands hereinafter described are part and parcel. And whereas the said party of the second part, hath, on the day of the date of these presents, paid to the said party of the first part, the sum of eighteen hundred dollars, part of the moneys secured by the mortgage aforesaid, as therein specified, on which payment the said party of the first part hath agreed to release to the said party of the second part, his heirs and assigns, the lands hereinafter described, and take and accept the residue of the said mortgaged premises as his security for the payment of the moneys remaining unpaid on the said mortgage.

Now, therefore, if the said Thomas Harper, party of the first part, in consideration of the premises and of the said sum of eighteen hundred dollars, so paid to me by said party of the second part, doth hereby grant, release, assign, and make over unto the said party of the second part, and to his heirs and assigns, all that portion of said mortgaged lands, bounded and described as follows, viz.: [*insert description,*] together with all and singular the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining.

To have and to hold the lands and premises hereby released and conveyed to the said party hereto of the second part, his heirs and assigns, to his and their only proper use and behoof forever, free, clear and discharged of and from the lien of the said mortgage.

In witness whereof, the said party of the first part hath here-

unto set his hand and seal, the day and year first above written.

Sealed and delivered in } THOS HARPER. [L. s.]  
presence of }

*Agreement to Increase Rate of Interest and Pay Taxes on Mortgage.*

Know all men by these presents, that we, Erwin Davis and Charles L. Weller, the obligors named in a certain bond in the penal sum of            dollars, bearing date the            day of

A. D. 1860, conditioned for the payment of the sum of            dollars, with interest at the rate of            per cent. per month, to Cutler McAllister, the obligee therein named, which bond is secured by the mortgage of the said Erwin Davis, bearing even date therewith, and recorded in the office of the county recorder of the county of San Francisco, in liber No.            of mortgages, at page            on the            day of            A. D. 1860, and which said bond and mortgage are now wholly due and payable, do hereby for ourselves, heirs, executors, administrators and assigns, in consideration of the sum of five dollars, lawful money to us in hand paid by the said Cutler McAllister, the receipt whereof is hereby acknowledged, covenant, grant, promise and agree to and with the said Cutler McAllister, his executors, administrators and assigns, that the said principal sum of            dollars, shall from and after the date of these presents, bear interest at the rate of one and one-half of one per cent. per month, and that we will pay such interest at the times and in the manner in said bond and mortgage provided, and further, that we will pay and discharge at maturity, all taxes and assessments which are or may be imposed upon the said bond and mortgage, or upon the moneys thereby secured until the said bond and mortgage shall be fully paid and satisfied, and in case of our default in making such payment, that it shall be lawful for the said Cutler McAllister, his executors, administrators, or assigns, to pay and discharge the same, and such payment when made shall be taken and deemed to be a charge upon the lands and premises in said mortgage described, shall be added to the principal moneys thereby secured, and shall bear interest thereafter at the same rate. And I the said Erwin Davis, for the consideration aforesaid, do hereby grant and convey unto the said Cutler McAllister, his heirs and assigns, the lands in said mortgage described, as security for the performance of this agreement, subject to the proviso in the said mortgage contained.

In witness whereof, we have hereunto set our respective hands and seals this first day of July, A. D. 1860.

Sealed and delivered in } ERWIN DAVIS. [L. s.]  
the presence of } C. L. WELLER. [L. s.]

*Agreement to Extend the Time for Payment of Mortgage*

This agreement, made this 17th day of November, A. D. 1856, between Erwin Davis, of the city of San Francisco, administrator, &c., of the first part, and George L. Kenny and Albert L. Bancroft, of the same place, of the second part, witnesseth, whereas the said party of the first part is the holder of a certain promissory note, made by George L. Kenny and Albert L. Bancroft, under their firm name of Kenny & Bancroft, for the sum of thirty thousand dollars, dated the seventeenth day of November, A. D. 1855, and payable one year after the date thereof, with interest thereon at the rate of one and one-half per cent. a month, monthly, in advance, with a provision that, in case of default in the payment of any instalment of said interest for the space of fifteen days after the same should become payable, it should be optional with said party of the first part, to consider said principal sum, and all arrearages of interest thereon, immediately due and payable.

And whereas, the said party of the first part holds a certain mortgage made by the said George L. Kenny and Albert L. Bancroft, dated October 14th, A. D. 1854, and recorded in the county recorder's office of San Francisco county, in liber No. 48 of mortgages, at page 984, October 24, A. D. 1854, as security for the payment of said note and interest, under the terms of a certain agreement bearing date on said 17th day of November, 1855, and duly recorded in said office, in liber No. 23 of covenants, at page 365, November 25, 1855. And whereas, the said note has, by the terms thereof, become due and payable, and the said parties of the second part have applied to said party of the first part, to extend the time of the payment thereof twelve months from the date of these presents, and he has consented to do so upon the same terms and conditions as originally provided therein.

Now, in consideration of the premises, it is mutually covenanted and agreed between the said parties, that the time of payment of the said promissory note shall be, and the same is hereby extended for the period of twelve months from the date of these presents; and the said parties of the second part do hereby covenant and agree to and with the said party of the first part, his successors and assigns, to pay him the said sum of thirty thousand dollars, at the expiration of one year from the date of these presents, and also to pay him the interest thereon at the rate, and at the times, and in the manner, and subject to the like conditions, as are expressed in said promissory note; and they hereby grant, convey and mortgage to the said party of the first part, the said premises described in the mortgage herein above referred to, upon the terms and conditions in said mortgage

contained, as additional security for the performance of this agreement.

It is further mutually agreed between said parties, that recourse shall not be had to said mortgage until said period of twelve months shall have expired, unless, in case of default in the payment of the interest on said note, the said party of the first part shall have sooner elected to consider said note and mortgage as due and payable.

In witness whereof, the respective parties to these presents have hereunto, and to a duplicate hereof, interchangeably set their hands and seals, the day and year first above written.

Sealed and delivered	{	ERWIN DAVIS. [L. s.]
in presence of		GEORGE L. KENNY. [L. s.]
		ALBERT L. BANCROFT. [L. s.]

*Assignment of Lease by way of Mortgage.*

This indenture, made and entered into, this 26th day of July, A. D. 1858, between Cecil M. Derby, of the city of San Francisco, of the first part, and Emanuel B. Ketchum of the same place, of the second part.

Whereas, Marion M. Bancroft and E. Martin Palmer did, by a certain indenture of lease, bearing date the fifth day of May, A. D. 1857, and to be recorded in the county recorder's office of the county of San Francisco, simultaneously herewith demise, lease, and to farm let unto the said party hereto of the first part, and to his executors, administrators, and assigns, all and singular the premises hereinafter mentioned and described, together with the appurtenances for, and during, and until the full end and term of five years from the twentieth day of August, in the year 1856, and fully to be complete and ended with certain privileges of renewal therein contained, yielding and paying therefor to the said Marion M. Bancroft and E. Martin Palmer, and to their executors and assigns, the monthly rent or sum of three hundred and fifty dollars; and whereas, the said party of the first part is justly indebted to the said party of the second in the sum of five thousand seven hundred and seventy-five dollars, lawful money, secured to be paid by his certain promissory note, bearing even date with these presents, of which the following is a copy, viz.:

\$5,775 00.

San Francisco, July 26, 1858.

Six months after date, for value received, I promise to pay to the order of Emanuel B. Ketchum, five thousand seven hundred and seventy-five dollars, with interest thereon at the rate of two and one-half of one per cent. per month, payable monthly, in advance. If any instalment of such interest shall become due and be unpaid for the space of fifteen days, then, and from thence-

forth the interest on the said sum of five thousand seven hundred and seventy-five dollars is to be compounded monthly. If any instalment of said interest shall become due before the maturity of said note, and be unpaid for the space of fifteen days, then it shall be optional with the payee, or his assigns, to consider this note as immediately due, and payable with compound interest as aforesaid,

[*Endorsed.*]

[*Signed.*]

as, by the said promissory note, reference being thereto had, may more fully appear.

Now this indenture witnesseth: that the said party of the first part, for the better securing the payment of the said sum of money secured to be paid by the said promissory note, with interest thereon, according to the true intent and meaning thereof, and also for and in consideration of the sum of one dollar to him in hand paid by the said party of the second part, at or before the ensealing and delivering of these presents, the receipt whereof is hereby acknowledged, hath granted, bargained, sold, assigned, transferred, and set over, and by these presents doth grant, bargain, sell, assign, transfer, and set over unto the said party of the second part, and to his heirs and assigns forever, all that certain lot, piece, or parcel of land situate, lying, and being in the city and county of San Francisco, bounded and described as follows, viz.: [*here insert description,*] together with the buildings thereon known as "the Chinese Amphitheatre," with the appurtenances thereof, and all the machinery, scenery, fixtures, furniture, properties, wardrobe and decorations belonging and appertaining thereto, with all and singular, the rights and privileges thereunto belonging, or in anywise appertaining, and also all the estate, right, title, interest, term and terms of years yet to come and unexpired, property, possession, claim and demand whatsoever, as well in law as in equity, of the said party of the first part, of, in and to the said demised premises, and of, in and to the building or buildings erected thereon, and every part and parcel thereof with the appurtenances, and also the said indenture of lease, and every clause, article, privilege, condition and covenant therein contained. To have and to hold the said indenture of lease and other hereby granted premises, unto the said party of the second part, his executors, administrators and assigns, to his and their only proper use, benefit and behoof, for and during all the rest, residue and remainder of the said term and terms of years yet to come and unexpired, subject, nevertheless, to the rents, covenants, provisions and conditions in the indenture of lease mentioned; *provided*, always, and these presents are upon this express condition, that if the said party of the first part, his executors or administrators, shall

well and truly pay unto the said party of the second part, his executors, administrators and assigns, the said sum of money secured to be paid by the said promissory note, and the interest thereon, at the time and in the manner mentioned in the said promissory note, according to the true intent and meaning thereof, and also pay the other moneys hereinafter agreed to be paid as herein provided, that then these presents and the estate hereby granted shall cease, determine, and be utterly void. And the said party of the first part, for himself, his heirs, executors and administrators, doth covenant and agree to pay unto the said party of the second part, his executors, administrators or assigns, the said sums of money and interest as mentioned above, and secured to be paid as aforesaid, and also to pay the said monthly rent so reserved and agreed to be paid on said indenture of lease as aforesaid. And if default shall be made in the payment of the said sum of money above mentioned, or in the interest that may grow due thereon or in any part thereof, or in the said monthly rent so reserved and agreed to be paid in and by said indenture of lease as aforesaid, that then, and from thenceforth, it shall be lawful for the said party of the second part, his executors, administrators and assigns, and he and they are hereby empowered and authorized to consider the whole amount of said promissory note as immediately due and payable, and to enter into and take possession of, all and singular, the said demised premises, and to let or underlet the same, and to collect the rents due or to become due therefor, and apply the moneys thus received toward the payment of the said monthly rent agreed to be paid in and by said indenture of lease, and the balance toward the payment of the interest due and to become due upon said promissory note, and the balance thereof toward the principal of said promissory note until the same is fully paid, or to sell, transfer and set over all the rest, residue and remainder of the term and terms of years then yet to come and unexpired of the said indenture of lease, and all the other the right, title and interest of the said party of the first part, his heirs, executors, administrators, or assigns of, in, and to the same, and the hereby assigned premises, at public auction, according to law and under the direction of some court of competent jurisdiction. And as the attorney of the said party of the first part for that purpose by these presents, duly authorized, constituted, and appointed to make and deliver to the purchaser or purchasers thereof a good and sufficient assignment or transfer in the law for the same, and out of the moneys arising from such sale to retain the principal and interest which shall then be due on the said promissory note, together with the costs and charges of advertisement and sale of the same premises and



of suit for foreclosure, including counsel fees, at the rate of ten per cent. upon the amount which may be found to be due for principal and interest by the said decree, and also the amount of all such payment of taxes, assessments, rents or incumbrances as may have been made by said party of the second part, his heirs, executors, administrators or assigns, by reason of the permission hereinafter given, with the interest on the same hereinafter allowed, rendering the overplus of the purchase money, if any there shall be, unto the said party of the first part, his heirs, executors, administrators or assigns, which sale so to be made shall forever be a perpetual bar, both in law and equity, against the said party of the first part, his heirs and assigns, and all other persons claiming, or to claim, the premises or any part thereof, by, from, or under him, them, or either of them. And it is hereby agreed that it shall be lawful for the said party of the second part, his heirs, executors, administrators, or assigns, to pay and discharge at maturity all such taxes, rents, or assessments, liens, or other incumbrances now subsisting or hereafter to be laid or imposed upon said demised premises, and which may be in effect a prior charge thereupon to these presents, including all rents and other charges reserved in said indenture of lease, and for such payments shall be allowed interest at the rate of three per cent. per month. Such payment and interest shall be considered as secured by these presents, and a charge upon said lots of land, lease and premises shall be repayable on demand, and may be deducted from the proceeds of the sale above authorized. And the said party of the first part, for himself, his executors, and administrators, doth hereby covenant and agree that he and they shall and will insure and keep the buildings erected and to be erected upon the said demised premises insured against loss by fire until each promissory note shall be fully paid, in a sum not less than seven thousand dollars, in some one or more insurance companies in good standing, to be approved by the party hereto of the second part, and assign the policy and certificates thereof to the said party of the second part, his executors, administrators, and assigns, and in default thereof it shall be lawful for the said party of the second part, his executors, administrators, and assigns, to effect such insurance for periods of not less than six months, and the premium and premiums paid for effecting the same shall be a lien on the said mortgaged premises added to the amount of said promissory note, and bear interest at the rate of three per cent. per month, and be secured by these presents and be repayable on demand. And the said party of the first part, for himself, his executors and administrators, doth hereby covenant to and with the said party of the second part, his executors, administrators, and assigns that the said premises hereby granted

are free and clear of and from all incumbrance of every name and nature whatever.

In witness whereof, the said party of the first part hath hereunto set his hand and seal, at the city of San Francisco, the day and year first above written.

CECIL M. DERBY. [L. s.]

Sealed and delivered in presence }  
of M. NASH.

## CHAPTER XXXI.

## NOTARY.

## STATUTORY PROVISIONS.

By the statute of California, the governor is authorized to appoint a certain number of notaries for each of the respective counties, to hold office for two years, and until their successors are appointed and qualified.<sup>1</sup>

Each notary public, before entering upon the duties of his office, shall take the oath of office, which shall be endorsed on his commission, and shall enter into bond to the state in the sum of five thousand dollars, with sureties to be approved by the county judge of the county for which said notary may be appointed.

The bond, together with a certificate of the oath, shall be filed and recorded in the office of the county clerk of such county.

See chapter on OFFICIAL BOND AND OATH.

He is also required to provide a notarial seal, with a device of the coat of arms of the state, and the name of his county,<sup>2</sup> with which to authenticate all his official acts. The statute provides, however, that all officers authorized to administer oaths and affirmations, may certify the same under their hands, without affixing their seals.<sup>3</sup>

Notaries public shall have authority to demand acceptance and payment of foreign bills of exchange, and to protest the same for non-acceptance and non-payment, and to exercise such other powers and duties, as by the law of nations and according to commercial usages, or by the law of any other state, government, or country, may be performed by notaries public.<sup>4</sup>

They may also demand acceptance of inland bills of exchange and payment thereof, and of promissory notes, and may protest

<sup>1</sup> Wood's Dig. art. 2842.

<sup>2</sup> Id. 2846.

<sup>3</sup> Id. 2896.

<sup>4</sup> Id. 2844.

the same for non-acceptance or non-payment, as the case may require.<sup>1</sup>

Each notary public shall have power to take and to certify the acknowledgment or proof of powers of attorney, mortgages, deeds, and other instruments of writing, the acknowledgment of conveyance, or other instrument of writing executed by any married woman, to take depositions, and to administer oaths and affirmations in all matters, incident or belonging to duties of his office, and to take affidavits to be used before any court, judge, or officer of this state.<sup>2</sup>

He is required to keep a fair record of his official acts, except those mentioned in the preceding section, and to give, when required, a certified copy of any record or paper in his office, whether his own or those of any predecessor, to any person, upon payment of the fees thereof.<sup>3</sup>

Upon expiration of his office, he must deliver his record and public papers to his successor. If he die, resign, be disqualified, or remove from the county, they must be delivered within thirty days to the recorder of the county, who must deliver them to the successor of such notary, when qualified.<sup>4</sup>

His seal, registers and official documents are exempt from execution; and, in case of his death or removal, his register and official documents must be lodged in the office of the county recorder for the use of his successor.<sup>5</sup>

For any misconduct or neglect of duty in any of the cases in which any notary public appointed under the authority of this state, is authorized to act, either by the law of this state, or of any other state, government, or country, or by the law of nations, or by commercial usage, he shall be liable on his official bond to the parties injured thereby, for all damages sustained. For any wilful violation or neglect of duty, any notary public shall be subject to criminal prosecution, and may be punished by fine not exceeding two hundred dollars and removal from office.<sup>6</sup>

Any certificate or instrument, either printed or written, purporting to be the official act of a notary public of this state, and purporting to be under the seal and signature of such notary

<sup>1</sup> Wood's Dig. art. 2844.

<sup>2</sup> id. 2845-2850.

<sup>3</sup> id. 2849.

<sup>4</sup> id. 2844.

<sup>5</sup> id. 2849.

public, shall be received as *prima facie* evidence of the official character of such instrument, and of the truth of the facts therein set forth.<sup>1</sup>

The original protest of a notary public, under his hand and official seal, of any bill of exchange or promissory note for non-acceptance or non-payment, stating the presentment by him of such bill of exchange or note for acceptance or payment, and the non-acceptance or non-payment thereof, and the service of notice on any or all of the parties to such bill of exchange or promissory note, and specifying the mode of giving such notice, and the reputed place of residence of the party to such bill of exchange or promissory note, and specifying the mode of giving such notice, and the reputed place of residence of the party to whom the same was given, and the post-office nearest thereto, shall be *prima facie* evidence of the facts contained therein. The certificate of a notary public drawn from his record, stating the protest and the facts therein contained, shall be evidence of the facts in like manner as the original protest.<sup>1</sup>

#### FEES OF NOTARY PUBLIC.<sup>2</sup>

For drawing and copying every protest for the non-payment of a promissory note, or for the non-payment or non-acceptance of a bill of exchange, draft or check, two dollars. For drawing and serving every notice of non-payment of a promissory note, or of the non-payment or non-acceptance of a bill of exchange, order, draft or check, one dollar. For recording every protest, one dollar. For drawing an affidavit, deposition or other paper, for which provision is not herein made, for each folio, thirty cents. For taking an acknowledgment or proof of a deed or other instrument, to include the seal and the writing of the certificate, for each signature one dollar. For administering an oath or affirmation, twenty-five cents. For every certificate, to include writing the same, and the seal, one dollar.

In the counties of Sonoma, Santa Clara, San Mateo, Napa, San Joaquin, Los Angeles, Contra Costa, Sacramento, Alameda, Humboldt, Colusi, Santa Cruz, Santa Barbara, San Luis Obispo and Monterey, the following are fees of a notary public:<sup>2</sup>

For drawing and copying every protest for the non-payment

<sup>1</sup> Wood's Dig. art. 2847, 2848.

<sup>2</sup> Id. 2396, 2442.

of a promissory note, or for the non-payment or non-acceptance of a bill of exchange, draft or check, one dollar and fifty cents. For drawing and serving every notice of non-payment of a promissory note, or of the non-payment or non-acceptance of a bill of exchange, order, draft or check, one dollar. For recording every protest, one dollar. For drawing an affidavit, deposition, or other paper, for which provision is not herein named, for each folio, twenty cents. For taking an acknowledgment, or proof of a deed or other instrument, to include the seal and the writing of the certificate, for the first signature, one dollar, and for each additional signature, twenty-five cents. For administering an oath or affirmation, twenty-five cents. For every certificate, to include writing the same, and the seal, one dollar.

By act of Congress, Sept. 16th, 1850, it is enacted, that in all cases in which, under the laws of the United States, oaths or affirmations, or acknowledgments may now be taken or made before any justice or justices of the peace of any state or territory, such oaths, affirmations, or acknowledgments may be hereafter also taken or made by or before any notary public duly appointed in any state or territory, and, when certified under the hand and official seal of such notary, shall have the same force and effect as if taken or made by or before such justice or justices of the peace. And all laws and parts of laws for punishing perjury, or subornation of perjury, committed in any such oaths or affirmations, when taken or made before any such justice of the peace, shall apply to any such offence committed in any oaths or affirmations which may be taken under this act before a notary public, or commissioner, as hereinafter named; *provided always*, that on any trial for either of these offences, the seal and the signature of the notary shall not be deemed sufficient in themselves to establish the official character of such notary, but the same shall be shown by other and proper evidence.

#### JUDICIAL DECISIONS.

When the condition of the bond of a notary public is, that he will "well and truly perform and discharge the duties of a notary public, according to law," *held*, that the clause embraces every act which he is authorized by law to do in virtue of his office.<sup>1</sup>

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<sup>1</sup> 10 Cal. 289.

Where a notary public, in taking and certifying an acknowledgment to a mortgage, neglected to state in his certificate that the party acknowledging the same was known to him, or was identified by the testimony of a witness examined by him for that purpose, *held*, that such notary was guilty of gross and culpable negligence, and is responsible to the party injured for the damages resulting from such negligence.<sup>1</sup>

The purpose of a certificate of acknowledgment is, to entitle the deed to be recorded, and to be admitted in evidence, without further proof. Such certificate is utterly worthless for either purpose.<sup>1</sup>

Such neglect on the part of the notary is not excused by the fact that the certificate (which was a printed one with blanks) had been partially filled by the attorney of the grantee.<sup>1</sup>

If the notary read the certificate before signing it, the omission must have been known to him; if he did not read it, he is equally guilty of negligence.<sup>1</sup>

A notary holds himself out to the world as a person competent to perform the business connected with the office. By accepting the office and entering upon the discharge of the duties, he contracts with those who employ him, that he will perform such duty with integrity, diligence and skill.<sup>1</sup>

A party employing a notary is not obliged to determine upon the validity or legality of his acts.<sup>1</sup>

When a mortgaged debt has been lost by such negligence of the notary, the measure of damages is the amount of the debt and interest to be secured by the mortgage.<sup>1</sup>

The governor of this state cannot remove from office a notary duly appointed, before his full term of office has expired.<sup>2</sup>

Where the law requires a joint and several bond, and the officer filed a bond which was in form joint, and not joint and several, *held*, that he and his sureties cannot complain that their obligation is less burdensome than the law required. The absence of the statutory requirements does not invalidate the bond.<sup>3</sup>

#### DEMAND, PROTEST AND NOTICE OF DISHONOR OF COMMERCIAL PAPER.

The presentment and demand of commercial paper having days of grace, must be made within reasonable hours on the last

<sup>1</sup> 10 Cal. 289.

<sup>2</sup> 6 Id. 291.

day of grace. For the purpose of fixing the liability of endorsers, the note or bill is payable on demand at any time within those hours.<sup>1</sup>

What are reasonable hours, will depend upon the question, whether or not the bill or note is payable at a bank, or place where, by the established usage of trade, business transactions are limited to certain stated hours.<sup>1</sup>

If there are such stated hours where the note or bill is payable, the presentment and demand must be made within those hours. But if there are no stated hours, and no place of payment is designated in the note or bill, the presentment and demand may be made either at the place of business or residence of the maker or acceptor.<sup>1</sup>

If at his place of business, it must be within the usual business hours of the city or town; if at his residence, then within those hours when the maker or acceptor may be presumed to be in a condition to attend to business.<sup>1</sup>

Notice may be given to the endorser, or other parties entitled to notice, immediately after presentment to the maker or acceptor, and refusal by him to pay, although it is not necessary that notice should be given until the following day.<sup>1</sup>

After due presentment and demand, the liability of the parties becomes fixed. If, however, the maker of the note chooses after this to seek out the holder, and pay his note, he can do so, and thus save himself from the liability to suit on the following day.<sup>2</sup>

For the purpose of fixing the liability of an endorser, the note is payable on demand at any time, during reasonable hours, on the last day of grace; but for the purpose of sustaining an action, the holder must wait until the following day, as the maker has the whole day to make payment.<sup>1</sup>

A notarial certificate of presentment and demand, and of protest for non-payment of a promissory note, taken from the record of the notary, is admissible, and is *prima facie* evidence of the facts contained therein, in like manner as the original protest.<sup>1</sup>

It is not necessary that the certificate should state the form of notice given; any notice is sufficient if it inform the party to whom it was given, either in express terms or by necessary in-

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<sup>1</sup> *McFarland v. Pico*, 8 Cal. 636.



plication, that the note has been duly presented at its maturity, and dishonored.<sup>1</sup>

There is no necessity for protesting a promissory note; a demand for payment, and upon neglect or refusal to pay, notice to the endorser, are all that is required.

In all cases where notice of non-acceptance or non-payment of a bill or note, or other negotiable instrument, may be given by mail, it will be sufficient if such notice be directed to the city or town where the person sought to be charged resided at the time of making, drawing, or endorsing the same, unless at the time of such making, drawing, or endorsing, he shall specify thereon the post-office to which he may require the notice to be addressed.<sup>2</sup>

A notice of protest should be sent to the post-office at which the person to whom it is directed is accustomed to get his letters, where his address is not endorsed on the bill or note.

No precise form of words is necessary to constitute a sufficient notice of protest. The identity of the note, and the fact of the demand and non-payment, must be brought home to the party sought to be charged, and the notice may be either oral or written.

The certificate of the notary need not state by whom the service of notice and deposit in the post-office was made.

In order to hold an endorser liable, a demand of payment on bills or notes must be made on the third day of grace. If the third day falls on Sunday, or on any great holiday, demand must be made on Saturday, or the day preceding the holiday. The demand must be made at the place of business of the maker or acceptor, within business hours, or at the place of payment, where it is specified. If the party has absconded, no demand is necessary; and where he has no place of business, it may be made at his dwelling-house. It is competent for any person who has arrived at years of discretion, though not a notary, to make the demand, if authorized by the holder. An endorsed note, payable on demand, must be presented within a reasonable time.

Where a note, not payable at any particular place, is made and endorsed in California, and both the maker and endorser reside in a foreign country, it must be duly presented to the maker, if

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<sup>1</sup> McFarland v. Pico, 8 Cal. 626.

<sup>2</sup> Wood's Dig. art. 194.

the place of his residence be known, and notice given to the endorser, in order to charge the latter.<sup>1</sup>

Notice may be dispensed with by express waiver, or by any act which will amount to a waiver.<sup>1</sup>

The protest of a promissory note must be attended with all the incidents of a foreign bill of exchange. It is the duty of the notary to give notice of protest to the endorsers.<sup>2</sup>

If a note be endorsed after it is due, the endorser is entitled to demand and notice before he is liable to his endorser. No time is expressly limited, as in case of notes or bills not due, for demand and notice to the endorser, but the law requires a demand to be made in a reasonable time, and notice of default seasonably given.<sup>3</sup>

A notary or other officer authorized to take and certify acknowledgments, and the proof of the execution of deeds and other instruments, cannot alter or correct his certificate, even to insert the statement of a fact inadvertently omitted, after some decisive act is done showing that he has exercised his authority over the subject. After taking the acknowledgment, and making and delivering the return, his functions cease, and he is discharged from all further authority.<sup>4</sup>

For further matter pertaining to the duties and office of notary see ACKNOWLEDGMENTS, BILLS AND NOTES, CONTRACTS, &c.

#### OREGON.

In *Oregon*, notaries are appointed, one or more for each county, by the governor, for two years, unless sooner removed by the governor, and have power to act, by virtue of their office, throughout the state.<sup>5</sup>

The notary must take the oath, give bond in five hundred dollars, and deposit an impression of his seal, together with his oath and bond, in the office of the secretary of state.<sup>6</sup>

He has full power and authority to acknowledge deeds and administer oaths, and to make protests, attestations, and other instruments of publication.<sup>7</sup>

It is his duty to protest bills, notes, and other instruments, and

<sup>1</sup> 7 Cal. 578.

<sup>2</sup> 6 id. 682.

<sup>3</sup> *Beebe v. Brooks*, January Term, 1859.

<sup>4</sup> *Bours v. Zachariah*, October Term, 1868.

<sup>5</sup> Statutes O. 474, 475.

give immediate notice to every maker, surety and endorser. He must serve the notice upon the person or persons protested against, provided he or they reside within two miles of the residence of the notary; if more than two miles the notice may be forwarded by mail or other safe conveyance.<sup>1</sup>

He must keep a record of all such notices, and of the time and manner in which the same shall have been served; and of the names of all the parties to whom the same were directed, and the description and amount of the instrument protested, which record shall at all times be competent evidence to prove such notices in any trial before any court in the state, whose proof of such notice may become requisite.<sup>1</sup>

Upon vacating his office all his records and papers must be deposited with the clerk of the District Court of his county, and on his neglect, or that of his representative in case of his death, to so deposit his records and papers, for three months, the delinquent is liable to a fine of from fifty to five hundred dollars. If any person knowingly destroy, deface or conceal any records or papers of a notary, he is liable to the like fine and damages to the party injured.<sup>1</sup>

It is the duty of such clerk to safely keep such papers and records, and he has full authority to give attested copies of the same while in his possession.<sup>1</sup>

#### WASHINGTON.

There shall be as many notaries public biennially appointed by the governor for the several counties as he shall deem expedient, and they shall be severally commissioned and engaged according to law.<sup>2</sup>

Notaries public are hereby authorized within their respective counties to act, transact, do and furnish all matters and things relating to protests, and protesting bills of exchange and promissory notes, and all other matters within their office required by law; to take depositions as prescribed by law, and acknowledgments of deeds and other instruments, and to administer oaths.<sup>3</sup>

On the death, resignation, or removal from office of any notary public, his records, together with all his official papers, shall be

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<sup>1</sup> Statutes O. 474, 475.

<sup>2</sup> Statutes Wash. T. p. 444.

deposited in the office of the clerk of the District Court, for the county in which the said notary public resided.<sup>1</sup>

If any notary public on his resignation or removal from office shall, for the space of three months, neglect to deposit his records and official papers in the clerk's office, he shall forfeit a sum not exceeding five hundred dollars.<sup>1</sup>

Every notary public, before he enters upon the duties of his office, shall provide an official seal, and deposit an impression of the same (together with said oath and bond) in the office of the secretary of the territory.<sup>1</sup>

#### FORMS.

##### *Notary's Bond.*

Know all men by these presents, that we, R. H. Sinton, as principal, and C. K. Garrison, Austin E. Smith and George H. Hossefross, as sureties, all of the city of San Francisco, state of California, the said Sinton in the sum of five thousand dollars, and the said sureties in the following named sums, viz.: C. K. Garrison for five thousand dollars, and A. E. Smith and George H. Hossefross for the sum of twenty-five hundred dollars each, making, in the aggregate, the whole penal sum of five thousand dollars, lawful money of the United States, to be paid to the said state of California, for which payment well and truly to be made, we bind ourselves, our heirs and administrators, firmly, by these presents, sealed with our seals, and dated this 26th day of March, A. D. 1859.

The condition of the above obligation is such that, whereas, John B. Weller, governor of California, has commissioned the above-bounden R. H. Sinton a notary public in and for the city and county of San Francisco, by commission dated the 23d day of March, A. D. 1859: Now, therefore, if the said B. H. Sinton shall well and truly perform the duties of a notary public, as aforesaid, during his incumbency of said office under and by virtue of the commission aforesaid, according to law, and shall faithfully discharge all duties which may be required of him by any law enacted subsequently to the execution of this bond, then this obligation shall become void; otherwise, to remain in full force and effect.

Witness our hands and seals, this 26th day of March, 1859.

(Signed)

R. H. SINTON.	[L. S.]
C. K. GARRISON.	[L. S.]
A. E. SMITH.	[L. S.]
Geo. H. Hossefross.	[L. S.]

<sup>1</sup> Statutes Wash. T. p. 444.

*Justification upon above Bond.*

State of California,  
City and County of San Francisco, } ss.

C. K. Garrison, Austin E. Smith and George H. Hossefross, sureties in the foregoing bond, being separately and duly sworn; each says for himself, that he is a resident and freeholder within the state and county aforesaid, and that he is worth double the sum for which he becomes liable as surety on the foregoing bond, over and above all his debts and liabilities, in unincumbered property situated within this state, which may be levied upon, and is not exempt from execution and forced sale.

(Signed)

C. K. GARRISON.

AUSTIN E. SMITH.

GEO. H. HOSSEFROSS.

Subscribed to and sworn before me, }  
this 26th day of March, 1859. }

GEO. F. KNOX, Notary Public.

*Endorsement of County Clerk on the same Bond.*

[Endorsed]

Filed March 26th, 1859.

WILLIAM DUER, County Clerk.

By D. P. BELKNAP, Deputy.

Recorded March 26th, 1859, in Record of Official Bonds, liber 1, page 123.

WILLIAM DUER, County Clerk.

By D. P. BELKNAP, Deputy.

*General Form of Notary's Certificate.*

United States of America,  
State of California, } ss:  
City and County of San Francisco, }

I, Henry A. Cobb, a notary public in and for the city and county of San Francisco, state aforesaid, duly commissioned, sworn and qualified, dwelling in the city of San Francisco, do hereby certify that [*here state the matter certified*].

In witness whereof I have hereto set my hand and af-  
[L. s.] fixed my notarial seal, this            day of           , A. D.  
1859.            HENRY A. COBB, Notary Public.

*Protest for Non-Acceptance.*

United States of America,  
State of California, } ss:  
City and County of San Francisco, }

On the            day of           , 1859, I, E. P. Peckham, a notary public in and for said city and county, duly commissioned and sworn, dwelling in the city of San Francisco, at the request

of A. B. [*insert name of the holder, or endorser, or endorsee*], did present the original bill of exchange, hereunto annexed, to E. F., the drawee therein named, for acceptance, who refused to accept the same: whereupon I, the said notary, at the request aforesaid, did protest, and by these presents do publicly and solemnly protest, as well against the drawee [*add, and endorsers, if necessary*] of said bill, as against all others whom it doth concern, for exchange, re-exchange, and all costs, damages, and interest, already incurred, and to be hereafter incurred, for want of acceptance of the same.

Thus done and protested, in the city and county of [L. s.] San Francisco, the day and year first above written.

E. P. PROKHAM, Notary Public.

*Certificate of Approval of County Judge, to be Endorsed upon the Bond.*

City and County of San Francisco, ss:

I, M. C. Blake, county judge of said city and county, do hereby approve of the sufficiency of the within bond, and of the sureties thereto; and I hereby certify that R. H. Sinton within named, this day took and subscribed the oath of office as notary public, endorsed upon his commission before me, in words and figures following, viz.:

State of California, }  
City and County of San Francisco, } ss.

I, R. H. Sinton, of the city and county aforesaid, do solemnly swear, that I will support the constitution of the United States, and of the state of California, and that I will faithfully discharge the duties of the office of notary public, in and for said city and county, according to the best of my ability.

(Signed)

R. H. SINTON.

Sworn and subscribed before me, this }  
26th day of March, A. D. 1849. }

(Signed)

M. C. BLAKE, County Judge.

Given under my hand, at the city-hall in said city and county of San Francisco, this 26th day of March, A. D. 1859.

(Signed) M. C. BLAKE, County Judge.

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*Protest of Bill or Note for Non-Payment, with Certificate of Service of Notice.*

United States of America, }  
State of California, } ss:  
City and County of San Francisco, }

On the            day of           , 1859, at the request of A. B. [*insert the name of the holder, endorser, endorsee, or banker*], I,

F. J. Thibault, a notary public, duly commissioned and sworn, dwelling in the city of San Francisco, in the state aforesaid, did present the original bill of exchange [*or, note*], hereunto annexed, to E. F., the acceptor [*or, maker*] of the said bill [*or, note*], and demanded payment, who refused to pay the same: [*or, did present the original note [or, check], hereunto annexed, at the banking-house of B. Davidson, where the same is made payable, [or, at the place of business of E. F., the acceptor [or, maker] of the said bill [or, note], he being absent therefrom, [or, at the dwelling house of E. F., &c., his place of business being closed, and he being absent from his said dwelling-house], and demanded payment of the same, which was refused*]: [*or, did make diligent inquiry for the said E. F., and his place of business, or dwelling-house, in the said city of \_\_\_\_\_, where the said bill [or, note] was made payable [or, purported to be drawn], but was unable to find the said E. F., or his place of business, or dwelling-house, in said city, in order to demand payment of the said bill [or, note]: Whereupon I, the said notary public, at the request aforesaid, did protest, and by these presents do solemnly and publicly protest, as well against the drawer and endorsers of the said bill [or, note, or, check], as against all others whom it doth or may concern, for exchange, re-exchange, and all costs, damages and interest, already incurred, and to be hereafter incurred, for want of payment of the same.*

Thus done and protested in the city and county aforesaid.

And I do hereby certify, that on the \_\_\_\_\_ day of \_\_\_\_\_, 1859, written notice of such demand, non-payment and protest, of the above-mentioned bill of exchange [*or, note*] was served by me upon C. D., the drawer of said bill, [*or, J. K., L. M. and O. P., the several endorsers of the said note*] personally: [*or, by letters respectively addressed to them at their reputed places of residence, and the post-offices nearest thereto, and deposited in the post-office in the city and county of San Francisco.*

Witness my hand and notarial seal, this \_\_\_\_\_ day  
[L. s.] of \_\_\_\_\_, 1859. F. J. THIBAULT,  
Notary Public.

### *Notice of Protest for Non-Payment.*

Sir: Take notice, that your bill for \$5,000, at thirty days from sight, dated May 1, 1859, drawn on and accepted by Henry Jones, has this day been protested for non-payment: [*or, that the bill of A. B. for \$1,000, at thirty days from sight, dated May 1, 1859, endorsed by you [or, by B., E., F., G., &c., &c.], and drawn on and accepted by C. D., has, &c., as above; or, that the note of Jos. Smith, for \$2,000, dated May 1, 1859, payable at the banking-house of Wells, Fargo and Co., sixty days after date,*

and endorsed by E. F. and G. H., has, &c., *as above*]. Dated  
Auburn, July 3, 1859. Your obt. servant,  
To CHAS. COX. P. W. THOMAS, Notary Public.

*Notice of Protest for Non-Acceptance.*

Sir: Take notice, that your bill for \$5,000, at thirty days from  
sight, dated May 1, 1859, drawn on Henry Jones, has this day  
been protested for non-acceptance. Dated Auburn, Placer county,  
May 5, 1859. Yours, &c. P. W. THOMAS, Notary Public.  
To CHAS. COX.

*Certificate of Notary Protest.*

United States of America,  
State of California, } ss:  
City and County of San Francisco,

On the tenth day of January, A. D. 1859, before me, J. C.  
Bunham, a notary public, duly commissioned for the city and  
county aforesaid, personally appeared Paul Sampson, master of  
the bark "Unseen," of Stoneybrook, who sailed from New York,  
in and with said bark "Unseen," on the seventh day of October,  
A. D. 1858, with a cargo of assorted articles, bound for the port  
of Victoria, and arrived at this port of San Francisco on the ninth  
day of January, 1859, having experienced heavy weather on the  
passage, and fearing damage, notes his protest to be extended, if  
need be.

Given under my hand and seal, in the city and county of San  
Francisco, the day and year first above written.

C. J. BUNHAM, Notary Public.

*Marine Protest.*

United States of America,  
State of California, } ss:  
City and County of San Francisco,

To all people to whom these presents shall come or may concern,  
I, W. W. Wiggins, a public notary, in and for the city and  
county aforesaid, by letters patent, under the great seal of the  
said state, duly commissioned and sworn, dwelling in the city  
of San Francisco, send greeting:

Know ye, that on the fifth day of May, in the year of our  
Lord one thousand eight hundred and fifty-nine, before me ap-  
peared William Folger, master of the ship called the Neptune,  
and noted in due form of law with me, the said W. W. Wiggins,  
notary, his protest, for the uses and purposes hereinafter men-  
tioned; and now at this day, to wit, the day of the date hereof,



before me, the said notary, at the city and county aforesaid, again comes the said William Folger, and requires me to extend his protest, and together with the said William Folger, also come Thomas W. Denison and James H. Rogers, seamen, belonging to the aforesaid ship, all of whom being by me duly sworn on the holy evangelists of the Almighty God, voluntarily, freely, and solemnly do declare, and depose as follows, that is to say, that he the said William Folger, set sail and departed in and with the said ship Neptune as master thereof, from Hong Kong, China, having on board the said ship a cargo of silks and teas, and bound for the port of New York, that the said ship was then stout, stanch and strong; had her cargo well and sufficiently stowed and secured; was well masted, manned, tacklod, victualled, apparelled, and appointed; and was in every respect fit for sea and the voyage she was about to undertake; that ten days after said ship had set sail, to wit: on the ninth day of January, 1859, in latitude, &c. [*here set forth particularly all the circumstances of the loss of the ship*] and the said William Folger, further says, that, as all the damage and injury which already has or may hereafter appear to have happened or accrued to the said ship or her said cargo, has been occasioned solely by the circumstances herein before stated, and cannot nor ought not to be attributed to any insufficiency of the said ship, or default of him, this deponent, his officers or crew, he now requires me, the said notary, to make his protest and this public act thereof, that the same may serve and be of full force and value, as of right shall appertain. And thereupon the said William Folger, doth protest, and I, the said notary, at his special instance and request, do, by these presents, publicly and solemnly protest against winds, weather and seas, and against all and every accident, matter and thing, had and met with as aforesaid, whereby or by means whereof the said ship or her cargo, already has, or hereafter shall appear to have suffered or sustained damage or injury, for all losses, costs, charges, expenses, damages, and injury which the said William Folger, or the owner or owners of the said ship, or the owners, freighters, or shippers of her said cargo, or any other person or persons interested or concerned in either, already have or may hereafter pay, sustain, incur or be put unto, by or on account of the premises, or for which the insurer or insurers of the said ship or her cargo is or are respectively liable to pay or make contribution or average according to custom, or their respective contracts or obligations; and that no part of such losses and expenses already incurred, or hereafter to be incurred, do fall on him the said William Sherman, his officers or crew.

Thus done and protested, in the city of San Francisco, this fifth day of May, in the year of our Lord one thousand eight hundred and fifty-nine.

In testimony whereof, as well the said appearers, as I, the notary, have subscribed these presents, and I have also caused my seal of office to be hereunto affixed, the day and year last above written.

[L. S.]

W. W. WIGGINS,  
Notary Public.

FORMS FOR ASSERTING PRE-EMPTION CLAIMS,

(FROM WOOD'S DIGEST—APPENDIX.)

*Declaratory Statement for cases where the Land has not been offered at Public Sale.*

I, A. B., of , being the head of a family, [or widow, or single man over the age of twenty-one years, as the case may be, a citizen of the United States, or, having filed my declaration to become a citizen, as required by the naturalization laws, as the case may be], have, on the day of , A. D. 185 , settled and improved the quarter of section number , in township, number , of range number , in the district of lands subject to sale at the land office at , and containing acres, which land has not yet been offered at public sale and thus rendered subject to private entry; and I do hereby declare my intention to claim the said tract of land as a pre-emption right, under the provisions of the act of March 3, 1853.

Given under my hand, this day of , A. D. 185 .  
A. B.

Signed in the presence of C. D.

*Declaratory Statement for cases where the Land shall have been offered at Public Sale.*

I, A. B., of , being the head of a family, [or widow, or single man over the age of twenty-one years, as the case may be, a citizen of the United States, or, having filed my declaration to become a citizen, as required by the naturalization laws, as the case may be], have, since the first day of , A. D. 185 , settled and improved the quarter of section number , in township number , of range number , in the district of lands subject to sale at the land office at , and containing acres, which land has been rendered subject to private entry since the passage of the act of March 3, 1853, but prior to my settlement thereon; and I do hereby declare my intention to claim the said tract of land as a pre-emption right, under the provisions of said act.

Given under my hand, this day of , A. D. 185 .

Signed in the presence of C. D.

*Affidavit to be filed in cases, under Act of March 3, 1853, where the Settler shall have died before proving up and entering his Claim.*

I, A. B. executor of the estate of C. D., [or, administrator of the estate of C. D., or, one of the heirs of C. D., aged years, *as the case may be*], do solemnly swear [or, affirm, *as the case may be*], that, to the best of my knowledge and belief, the said C. D., who was a settler on the quarter of section number , of township number , of range number

, subject to sale at , was not, at the time of his death, the owner of three hundred and twenty acres of land in any state or territory of the United States; that he did not settle upon and improve the above tract of land on speculation, but in good faith to appropriate it to his own exclusive use and benefit; and that he has not, directly or indirectly, made any agreement or contract, in any way or manner, with any person or persons whatsoever, by which the title which he might have acquired from the government of the United States should inure, in whole or in part, to the benefit of any person except himself.

(Signed)

A. B.,

Executor [or, administrator, or, one of the heirs of C. D., *as the case may be*].

I, E. F., register [or, G. H., receiver] of the land office at , do hereby certify that the above affidavit was taken and subscribed before me, this day of , A. D. 185 .

E. F., Register [or, G. H., Receiver].

*Affidavit required of Pre-emption Claimant.*

I, A. B., claiming the right of pre-emption, under the provisions of the act of Congress approved March 3, 1853, to the quarter of section number , of township number , of range number , subject to sale at , do solemnly swear [or, affirm, *as the case may be*], that I am not the owner of three hundred and twenty acres of land in any state or territory of the United States, nor have I settled upon and improved said land to sell the same on speculation, but in good faith to appropriate it to my own exclusive use or benefit; and that I have not, directly or indirectly, made any agreement or contract, in any way or manner, with any person or persons whatsoever, by which the title which I may acquire from the government of the United States should inure, in whole or in part, to the benefit of any person except myself.

(Signed)

A. B.

I, C. D., register [or, E. F., receiver] of the land office at , do hereby certify, that the above affidavit was taken and subscribed before me, this day of , A. D. 185 .

(Signed)

C. D., Register [or, E. F., Receiver].

United States of America,  
State of \_\_\_\_\_,

Land District, }

In testimony whereof, I \_\_\_\_\_, register of said land office,  
have hereto set my hand, at the register's office, in the city of \_\_\_\_\_  
; on this \_\_\_\_\_ day of \_\_\_\_\_, A. D. 185 \_\_\_\_\_.

## SCHOOL-LAND WARRANTS.

**Land Office, California.**

Subscribed and sworn to before me, this                      day of                      ,  
185                      A. B., Register.

## United States Land Office, State of

I, \_\_\_\_\_, of \_\_\_\_\_ county, having taken and subscribed the necessary affidavit, to the effect, that there is no settlement on or valid claim to the land sought, do hereby apply to locate this warrant number \_\_\_\_\_, upon the \_\_\_\_\_ quarter of section number \_\_\_\_\_, township number \_\_\_\_\_, range number \_\_\_\_\_. This selection is made in part satisfaction of the grant of five hundred thousand acres of land, made to the state of California by the eighth section of the act of Congress of September 4, 1841,

entitled "An Act to appropriate the Proceeds of the Sales of the Public Lands, and to grant Pre-emption Rights."

Given under my hand and seal, this                      day of                      ,  
A. D. 18                      .

*Patent for School Lands.*

State of California, }  
Executive Department, }

Know all men by these presents, whereas, A. B. is the holder of school-land warrant number                      , issued under and by virtue of the act of the state of California, passed on the third day of May, one thousand eight hundred and fifty-two, entitled "An Act to provide for the Disposal of the Five Hundred Thousand Acres of Land granted this State by Act of Congress;" and whereas, the said A. B. hath located the said warrant or warrants [*as the case may be*] upon the following-described lands, and accepts the same in full satisfaction for said warrant, to wit: [*here insert the description of land as contained in register's certificate.*] Now, therefore, I, C. D., governor of the state of California, by virtue of authority in me vested, have given, granted, bargained and sold, and do by these presents give, grant, bargain and sell, unto the said A. B., all the above-described lands, to have and to hold unto him, the said A. B., his heirs and assigns, forever, to and for his and their sole use, benefit and behoof, and for none other.

Witness my hand and the great seal of state, at                      this  
day of                      , A. D. 18                      .

[*Seal of State.*]

A. B., Governor.

Attest: C. D., Secretary of State.

BOUNTY LAND WARRANTS.—FORMS.

*As to Locations.*

There are three modes by which these locations may be made:

1. By the warrantee, or other legal owner of the warrant, in person.

2. By the warrantee, or other legal owner of the warrant, through the agency of this office.

3. By an agent or attorney of either of said parties.

If the first or second mode is adopted, the application must be made in writing, specifying the tract, land district, or section of country in which the location is desired, and be accompanied by an affidavit according to form No. 1, hereto appended.

Where the third mode is adopted, a power of attorney must be produced, executed by the owner of the warrant in the presence of a witness, according to form No. 2; which power of attorney

*Of Acknowledgment, where the Vendor is known to the Officer taking the same.*

State of \_\_\_\_\_, County of \_\_\_\_\_  
 On this \_\_\_\_\_ day of \_\_\_\_\_, in the year \_\_\_\_\_, before me personally came [*here insert the name of the warrantee or assignor*], to me well known, and acknowledged the foregoing assignment to be his act and deed; and I certify that the said [*here insert the name of warrantee or assignor*] is the identical person to whom the within warrant issued [*or, was assigned, as the case may be*], and who executed the foregoing assignment thereof. [Officer's signature.]

*Of Acknowledgment where the Vendor is not known to the Officer, and his Identity has to be proved.*

State of \_\_\_\_\_, County of \_\_\_\_\_  
 On this \_\_\_\_\_ day of \_\_\_\_\_, in the year \_\_\_\_\_, before me personally came [*here insert the name of the warrantee or assignor*] and [*here insert the name and residence of a witness*] and the said [*here insert the name of the witness*] being well known to me as a credible and disinterested person, was duly sworn by me, and on his oath declared and said that he well knew the said [*here insert the name of the warrantee or assignor*], and that he is the same person to whom the within warrant issued [*or, was assigned*], and who executed the foregoing assignment; and his testimony being satisfactory evidence to me of that fact, the said [*here insert the name of the warrantee or assignor*] thereupon acknowledged the said assignment to be his act and deed. [Officer's signature.]

FORM No 6.

*For the Assignment of the Location.*

For value received, I, A. B., to whom the within certificate of location was issued, do hereby sell and assign unto C. D., and to his heirs and assigns forever, the said certificate of location, and the warrant and land therein described, and authorize him to receive the patent therefor. A. B. [L. s.]

Witness my hand and seal, this \_\_\_\_\_ day of \_\_\_\_\_, 18 \_\_\_\_\_.

Attest, E. F., G. H.

*Of Acknowledgment, where the Vendor is personally known to the Officer taking the same.*

State of \_\_\_\_\_, County of \_\_\_\_\_  
 On this \_\_\_\_\_ day of \_\_\_\_\_, in the year \_\_\_\_\_, before me personally came [*here insert the name of the person to whom the certificate of location issued*], to me well known, and acknowl-

edged the foregoing assignment to be his act and deed; and I certify that the said *[here insert the name of the person to whom the certificate of location issued]* is the identical person to whom the within certificate of location issued, and who executed the foregoing assignment thereof. *[Officer's signature.]*

*Of Acknowledgment, where the Vendor is not personally known to the Officer, and where his Identity has to be proved.*

State of \_\_\_\_\_, County of \_\_\_\_\_.  
On this \_\_\_\_\_ day of \_\_\_\_\_, in the year \_\_\_\_\_, before me personally came *[here insert the name of the person to whom the certificate of location issued]* and *[here insert the name and residence of a witness]*, and the said *[here insert the name of the witness]*, being well known to me as a credible and disinterested person, was duly sworn by me, and on his oath declared and said that he well knows the said *[here insert the name of the person to whom the certificate of location issued]*, and that he is the same person to whom the within certificate of location issued, and who executed the foregoing assignment; and his testimony being satisfactory evidence to me of that fact, the said *[here insert the name of the person to whom the certificate of location issued]* thereupon acknowledged the said assignment to be his act and deed.

#### FORM No. 7.

##### *Of a Power of Attorney to sell a Warrant.*

Know all men by these presents, that I, *[here insert the name of warrantee]*, of the county of \_\_\_\_\_ and state of \_\_\_\_\_, do hereby constitute and appoint \_\_\_\_\_, of \_\_\_\_\_, my true and lawful attorney, for me and in my name, to sell and convey the within land warrant, No. \_\_\_\_\_, for \_\_\_\_\_ acres of land, which issued under the act of March 3, 1855.

Signed in presence of *[Warrantee's signature.]*

The forms of acknowledgment of a power of attorney and certification to be like those above described for the sale of the warrant.

#### FORM No. 8.

*Of the Certificate of the Clerk of the Court, Judge, or other person who is authorized to certify under seal, to the official character of the Officer who takes Acknowledgments or Assignments.*

State of \_\_\_\_\_, County of \_\_\_\_\_.

I, A. B. Clerk of the court of \_\_\_\_\_, in the county and state aforesaid, hereby certify, that John Jones, whose genuine signature is affixed to the above acknowledgment, was, at the time of

signing the same, a justice of the peace [notary public or other officer], duly authorized by law to take such acknowledgment, and that full faith and credit are due to all his official acts as such.

Given under my hand and the seal of said court, this  
day of           , 18           .  
[L. s.]           A. B., Clerk of the Court of           .

Where the acknowledgment is taken by a clerk of a court or judge using a seal, no certificate of his official character is required.

*Necessary Evidence for procuring Military Bounty Land Warrants.*

State of           , County of           , ss:

On this           day of           , A. D. one thousand eight hundred and           , personally appeared before me,           , a notary public, within and for the county aforesaid,           , aged           years, a resident of           , in the state of           , who being duly sworn according to law, declared that he is the identical           , who was a           commanded by           , at           , on or about the           day of           , A. D.           , for the term of           , and continued in actual service in said war for the term of fourteen days, and was honorably discharged at           , on the           day of           A. D.           .

He makes this declaration for the purpose of obtaining the           bounty land to which he may be entitled under the act approved March 3, 1845. He also declares that he has           .

We,           , residents of           , in the state of           , upon our oaths, declare that the foregoing declaration was signed and acknowledged by           , in our presence, and that we believe, from the appearance and statements of the applicant, that he is the identical person he represents himself to be.

Witnesses, A. B., C. D.

The foregoing declaration and affidavits were sworn to and subscribed before me on the day and year above written, and I certify that I know the affiants to be credible persons, that the claimant is the person he represents himself to be, and that I have no interest in this claim.

Witness my hand and official seal.

Know all men by these presents, that I,           aforesaid, do hereby constitute and appoint           to be my true and lawful attorney, for me and in my name to demand and receive from the secretary of war of the United States, a warrant for the quantity of land due me as aforesaid; and my said attorney is hereby fully authorized and empowered to constitute and appoint one or



more substitutes or attorneys under him for the special purposes above expressed. (Signed)

Attest:

Personally appeared the above-named \_\_\_\_\_, subscriber to the foregoing declaration, and made oath to the same, and in my presence acknowledged the power of attorney thereto subjoined to be \_\_\_\_\_ free act and deed, for the purposes therein mentioned.

Witness my hand and official seal. C. D., Notary Public.

Attest:

In testimony that the above written \_\_\_\_\_ was a notary public authorized to administer oaths and take acknowledgments, &c., in the state of \_\_\_\_\_, at the above date, and that his name there subscribed appears to me to be his usual signature, I have hereunto affixed the county seal, and subscribed my name and quality, at \_\_\_\_\_, this \_\_\_\_\_ day of \_\_\_\_\_, 18 \_\_\_\_\_.

[L. S.]

#### EXTRA PAY.

*Form for obtaining the Extra Pay of Officers, Seamen and Marines, serving in the United States Navy on the Pacific Coast.*

State of \_\_\_\_\_, County of \_\_\_\_\_.

I, \_\_\_\_\_, do solemnly swear that I am the identical \_\_\_\_\_ who served by that name as a \_\_\_\_\_ on board the United States ship \_\_\_\_\_, in the Pacific, on the coast of California and Mexico, from \_\_\_\_\_ to \_\_\_\_\_, and whose name is in the certificate of discharge, dated \_\_\_\_\_, signed by \_\_\_\_\_, which is herewith presented and surrendered.

I also solemnly swear that I am now \_\_\_\_\_ years of age; am a native of \_\_\_\_\_; that I enlisted at \_\_\_\_\_, on or about the \_\_\_\_\_, into the grade of \_\_\_\_\_; that my ship's number was \_\_\_\_\_; that my number on said ship was \_\_\_\_\_, and that I performed my duty on board of said \_\_\_\_\_.

I also solemnly swear that I have not made any previous or other application for extra pay due me \_\_\_\_\_, and I now make this application for extra pay that may be due me \_\_\_\_\_, and further, that I am now a resident of \_\_\_\_\_, and am employed as \_\_\_\_\_.

Sworn to and subscribed before me, a notary public in and for the state and county aforesaid, this \_\_\_\_\_ day of \_\_\_\_\_ A. D. 18 \_\_\_\_\_. And I hereby certify, that to my knowledge the statement of deponent in regard to his residence and employment, is true, my knowledge of deponent being derived from \_\_\_\_\_. And I also certify that the above-named deponent appears to be about the age stated by him; that he is about \_\_\_\_\_ feet \_\_\_\_\_ inches in height; of \_\_\_\_\_ complexion, \_\_\_\_\_ hair, and \_\_\_\_\_ eyes.

State of \_\_\_\_\_, County of \_\_\_\_\_.

On this, the \_\_\_\_\_ day of \_\_\_\_\_, 18\_\_\_\_, before me, a notary public in and for the state and county aforesaid, duly qualified to administer oaths, personally appeared \_\_\_\_\_, residing at \_\_\_\_\_, and employed as \_\_\_\_\_, who are known to me as creditable witnesses, residing and employed as stated, and who being duly sworn, depose and say, that they reside and are employed as aforesaid; that they have a personal knowledge of \_\_\_\_\_ who signed the foregoing \_\_\_\_\_ in their presence; and that he is the identical \_\_\_\_\_ who served on board the United States ship \_\_\_\_\_ as a \_\_\_\_\_, from \_\_\_\_\_ to \_\_\_\_\_, and who is named in the discharge dated \_\_\_\_\_, signed by \_\_\_\_\_, which he affixed in their presence to this application, &c., of identity; that their knowledge of him was obtained \_\_\_\_\_ . And they further depose that they have no interest in the claim of the said \_\_\_\_\_ for extra pay.

Sworn to and subscribed, the day and year above written.  
Given under my hand and seal of office.

\_\_\_\_\_, Notary Public.

State of \_\_\_\_\_, County of \_\_\_\_\_, ss:

Know all men by these presents, that I, \_\_\_\_\_, being entitled to extra pay under the act of Congress, entitled "An Act making Appropriation for the Naval Service for the year ending June 30, 18\_\_\_\_," approved \_\_\_\_\_, 18\_\_\_\_, amounting to \_\_\_\_\_ dollars and \_\_\_\_\_ cents, as a \_\_\_\_\_ from \_\_\_\_\_, 18\_\_\_\_, to \_\_\_\_\_, 18\_\_\_\_, on board the United States ship \_\_\_\_\_, which served in the Pacific Ocean, on the coast of California and Mexico, since May 13, 1846, for and in consideration of the sum of \_\_\_\_\_ dollars and \_\_\_\_\_ cents, to me in hand paid, do hereby appoint \_\_\_\_\_ my attorney, for me and in my name to demand and receive from the navy agent, at Washington, D. C., or other proper officer of the United States, the amount of extra pay hereinbefore recited, and to receipt therefor, hereby confirming all that my said attorney may lawfully do in the premises, as fully as if done by myself—with full power of substitution and revocation.

Signed and sealed in the presence of the undersigned, this  
day of \_\_\_\_\_, A. D. 18\_\_\_\_.

## CHAPTER XXXII.

## PARTNERSHIP.

THE relation of partnership is one of the most important that occurs in business life. "It is a connection, than which none more close can exist among men. It places in the power of him with whom you form it, your property and your reputation. His virtues and his skill, in unison with your own, may raise you to the highest pinnacle of prosperity. His folly, or his crimes, may strip you of every flourishing branch and leaf, and leave you, a naked, withered and dishonored trunk. It should be formed, therefore, with little less care than the marriage tie, to which it has been, by a late chancellor, not inaptly compared."<sup>1</sup>

Its introduction in this work, where each title is so briefly considered, can hardly prove of much practical benefit, and with but a remark or two upon its principal features, and the introduction of the statute regulating limited partnerships, the reader is referred for guidance to the excellent treatises of Story, Gow, and others, upon the law of partnership, and such professional advice as may be requisite.

Partnership has been defined to be the result of a contract whereby two or more persons agree to combine property or labor for the purpose of a common undertaking, and the acquisition of a common profit. There may be a partnership in one transaction as well as in a continuing business, and between persons out of trade as well as persons in trade.<sup>2</sup>

The community of profit is the criterion whereby to ascertain whether a contract be one of partnership; for one partner may stipulate to be free from loss, and the stipulation will hold good, as between himself and his companions, though it will not diminish his liability to strangers.<sup>3</sup>

To establish a partnership, other than the statutory limited

<sup>1</sup> Law Journal, vol. 1.

<sup>2</sup> Smith's Merc. Law, 48.

partnership, no particular mode of proceeding is necessary. It may be formed by a verbal agreement, or by written contract; and, except in some especial cases, where real estate is involved, it is not necessary that the agreement should be under seal. If the parties agree to unite their means and skill in the common undertaking, and proceed to act upon such agreement, their liability and authority as partners begin, without other formality. If no particular terms are mentioned and established, the law presumes that they are equal partners, in every respect, and that the interests, advantages, benefits, profits, losses and labors are equal.

A secret partner is one who is actually a partner by participation of profit, but is not avowed or known to be such; and a dormant partner is one who takes no share in the conduct or control of the business of the firm. Both of these are liable to creditors, even if the creditors did not know them to be members of the firm, on the ground of their interest and participation in the profits, which constitute, with the property of the firm, the funds to which creditors may look for payment. A nominal partner is one who holds himself out to the world as such, but is not so in fact. He is liable to creditors of the firm, on the ground that he justifies them in trusting the firm on his credit, and indeed, invites them to do so, by declaring himself to be a partner.

The liability of each member of the firm for its just debts created after he became a partner, extends not only to his interest in the property of the partnership, but also to his individual property. And such liability may be created not only by the joint act of the firm, but by that of either member.

A partnership may be dissolved at the will of any member, unless differently provided by the articles of agreement. He could not, however, exercise this power wantonly and injuriously to the other partners, without making himself responsible for the damage he may cause.

On the death of one of the parties the firm is dissolved, and the surviving partners have the right to close out the interest of the deceased member, and they are held accountable to the representatives of the deceased for the proceeds.<sup>1</sup>

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<sup>1</sup> Wood's Dig. art. 2317; Statutes O. p. 351; Statutes Wash. Ter. 274.

A partnership may also be dissolved, by the transfer by one or more partners, of his interest, or by decree of a competent court.

Until a dissolution of the partnership, one member cannot bring an action at law against the others. He may, however, file a bill in equity, praying a dissolution of the partnership, and that an accounting be had, and his just rights and claims be secured to him.

After the dissolution of a partnership, neither party can make any disposition of the partnership effects, inconsistent with the primary duty of paying the partnership debts; though either party may receive payment of debts due the firm, and apply the amount received on the partnership liabilities.

In case of the failure of a firm, if an assignment become necessary, such assignment can only be made under the mode laid down by our state law "for the relief of insolvent debtors, and the protection of creditors," which is treated of in the chapter entitled *INSOLVENCY*.

Where a firm is sued, the action may describe them by the common firm name, and the process may be served on one or more of the associates, but the judgment in such case shall bind only the joint property of the associates.<sup>1</sup>

#### LIMITED PARTNERSHIP.

ACT OF APRIL 4, 1850, TO AUTHORIZE THE FORMATION OF LIMITED PARTNERSHIPS.

SECTION 1. Limited partnerships for the transaction of mercantile, mechanical, mining or manufacturing business within this state, may be formed by two or more persons, upon the terms, and subject to the conditions and liabilities prescribed in this act; but nothing contained in this act shall authorize such partnerships for the purpose of banking or insurance.

SEC. 2. The said partnerships may consist of one or more persons, who shall be called general partners, who shall be jointly and severally responsible as general partners are by law, and of one or more persons who shall contribute to the common stock a specific sum in actual cash payment as capital, who shall be called special partners, and who shall not be personally liable for any debts of the partnership, except in the cases hereinafter mentioned.—[Amended May 3, 1854.]

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<sup>1</sup> Wood's Dig. art. 906.

**SEC. 3.** The persons forming such partnerships shall make and severally sign a certificate, which shall contain the name or firm under which said partnership is to be conducted, the names and respective places of residence of all the general and special partners, distinguishing who are general, and who are special partners, the amount of capital which each special partner has contributed to the common stock, the general nature of the business to be transacted, and the time when the partnership is to commence and when it is to terminate.

**SEC. 4.** No such partnership shall be deemed to have been formed, until a certificate, made as aforesaid, shall be acknowledged by all the partners, before some officer authorized to take acknowledgment of deeds, and recorded in the office of the recorder of the county in which the principal place of business of the partnership is situated, in a book to be kept for that purpose open to public inspection; and if the partnership shall have places of business situated in different counties, a copy of the certificate, certified by the recorder in whose office it shall be recorded, shall be filed and recorded in like manner, in the office of the recorder in every such county. If any false statement shall be made in any such certificate, all the persons interested in the partnership shall be liable as general partners for all the engagements thereof.

**SEC. 5.** The partners shall, for three successive weeks immediately after such registry, publish a copy of the certificate above mentioned, in a newspaper printed in the county where their principal place of business is situated, and if no such paper be there printed, then in a newspaper in the state nearest thereto; and in case such publication be not so made, the partnership shall be deemed general.

**SEC. 6.** Upon every renewal or continuation of a limited partnership, beyond the time originally agreed upon for its duration, a certificate thereof shall be made, acknowledged, recorded and published, in like manner as is provided in this act for the original formation of limited partnerships; and every such partnership which shall not be renewed in conformity with the provisions of this section, shall be deemed a general partnership.

**SEC. 7.** The business of the partnership shall be conducted

under a firm, in which the names of the general partners only shall be inserted, and the general partners only shall transact the business. If the name of any special partner shall be used in such firm, with his consent or privity, or if he shall personally make any contract respecting the concerns of the partnership, with any person except the general partners, he shall be deemed and treated as a general partner.

SEC. 8. During the continuance of any partnership under the provisions of this act, no part of the capital stock thereof shall be withdrawn, nor any division of interests or profits be made so as to reduce such capital stock below the sum stated in the certificate before mentioned. If at any time during the continuance, or at the termination of the partnership, the property or assets shall not be sufficient to pay the partnership debts, the special partners shall severally be held responsible for all sums by them in any way received, withdrawn, or divided, with interest thereon, from the time when they were so withdrawn respectively.

SEC. 11. All suits respecting the business of such partnership shall be prosecuted by and against the general partners only, except in those cases in which provision is made in this act, that the special partners shall be deemed general partners, and that special partnerships shall be deemed general partnerships, in which cases all the partners deemed general partners may join or be joined in such suits, and excepting also those cases where special partners shall be held severally responsible on account of any sum by them received or withdrawn from the common stock, as before provided.

SEC. 12. No dissolution of a limited partnership shall take place, except by operation of law, before the time specified in the certificate before mentioned, unless a notice of such dissolution shall be recorded in the recorder's office in which the original certificate, or the certificate of renewal or continuation of the partnership, was recorded, and unless such notice shall also be published for three successive weeks in some newspaper printed in the county where the certificates of the formation of such partnerships were published, according to the provisions of this act; and if no newspaper shall, at the time of such dissolution, be printed in such county, then the notice of such dissolution shall be published in some newspaper in this state nearest thereto.

SEC. 13. In all cases not otherwise provided for in this act, the members of limited partnerships shall be subject to all the liabilities, and entitled to all the rights of general partners.

No statute in regard to limited partnership exists in *Oregon* and *Washington*.

#### JUDICIAL DECISIONS.

Where a private creditor has execution against one of several copartners, his interest in the property of the firm may be seized and sold by the officer, and the purchaser at the sale will become a tenant in common with the other partner or partners: but the right which such purchaser may acquire will be subject to the adjustment of the partnership concerns, and the debts of the firm must be first satisfied out of the partnership effects.<sup>1</sup>

To affect the rights of one dealing with a partnership firm, actual notice of its dissolution must be brought home to him.<sup>2</sup>

Where a foreign miner, subject to a license, was employed by one of a partnership to work in the mines which were partnership property, the employer is liable for the license tax, and not the partnership.<sup>3</sup>

One partner cannot bind his copartner by a submission of partnership matters to arbitration; but such submission is good against the partner agreeing to it.<sup>4</sup>

A partnership may be dissolved by the wrongful acts of one of the parties.<sup>5</sup>

When a partner makes a note in the name of the partnership, it will render all the partners liable to a *bona fide* holder, although it has no relation to the partnership business, and the other partners were wholly ignorant of the transaction, and were even intentionally defrauded by their partner.<sup>6</sup>

Where a mining company, not incorporate, forms a trading partnership, with an individual under a firm name, each member of the mining company is a member of the firm.<sup>7</sup>

Where one of the mining company acted as salesman of the firm, it cannot be pretended that he was a dormant partner, whose acts would not bind the firm.<sup>8</sup>

<sup>1</sup> *Jones v. Thompson*, January Term, 1859.

<sup>5</sup> 7 id. 146.

<sup>2</sup> 3 Cal. 343.

<sup>4</sup> 4 id. 92.

<sup>3</sup> id. 408.

<sup>6</sup> 6 id. 168.

<sup>7</sup> 5 id. 343.



The filing of a bill by one partner against his copartners for a dissolution and account, and praying for an injunction and receiver, and an appointment of a receiver by the court, does not prevent a creditor from proceeding by attachment and gaining a priority over other creditors, until a final decree of dissolution and order of distribution.<sup>1</sup>

It is only in cases of insolvency that the equitable rule for a *pro rata* distribution will apply, and then as of necessity. If the firm be solvent, a creditor whose claim is due cannot be placed on a par with others whose claims are not yet due, or who have been less diligent in securing claims already due.<sup>1</sup>

Funds in the hands of a receiver in a suit for dissolution, are therefore subject to attachment at any time before a final decree of dissolution and distribution.<sup>1</sup>

A partnership may exist in the purchase and sale of lands, but such a partnership can only exist where the contract is reduced to writing. It is not necessary that the partners should be jointly concerned in the original purchase, where the interests of the partners are afterward mingled; but they must be jointly concerned in the future sale.<sup>2</sup>

It does not matter in whose name the real estate is held; he is only a trustee for the partnership; and for the purpose of disposal and distribution it is to be treated as personal estate.<sup>3</sup>

Parties may form a universal partnership, but the same would not be held to exist, unless the intention was clearly expressed. The evidence to establish such a partnership, after the death of one of the alleged partners, should be clear and full and not subject to doubt.<sup>4</sup>

When one of two holders of the leasehold, holding in partnership, purchases the fee in his own name and with his own money, it inures equally to the benefit of the other, to which he becomes entitled on payment of his proportion of the purchase money.<sup>5</sup>

Where there is nothing in the constitution of a joint-stock company which regulates the remedies of the shareholders, as between themselves, the general law of partnership must govern them.<sup>6</sup>

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<sup>1</sup> 9 Cal. 24.

<sup>2</sup> *Id.* 618.

<sup>3</sup> *Id.* 662.

<sup>4</sup> 10 *Id.* 60.

## FORMS.

*Partnership Articles.*

These articles of agreement made this      day of      , 1859, between John Jones and Smith Johns show:

1st. That said Jones and said Johns do this day form a partnership on mutual and equal terms, under the name, style and firm of Jones and Johns.

2d. Said partnership shall exist for two years [or, at the will of the parties].

3d. The business of said firm shall be the fruit-selling business, to be conducted in the city of San Francisco at as many stands as may be established.

4th. Each party contributes the sum of ten thousand dollars; the said Jones in cash, and said Johns furnishing for the use of the firm his rancho in Alameda county, with all the improvements, furniture and facilities thereof, to be considered as a contribution of ten thousand dollars in cash on his part.

5th. Said Jones is to oversee the sale of the fruit, and manage the business at the various fruit-stands in San Francisco, and said Johns is to attend to the cultivation and gathering of the fruit at the rancho, and to send it to San Francisco.

6th. Neither party is to draw more profits or monthly allowance from the concern than the other, and, in a word, all rights, privileges and advantages are to be mutual and equal.

Signed on the day above written.

JOHN JONES.  
SMITH JOHNS.

*Commercial Partnership Agreement.*

Memorandum of agreement made and entered into at the city of San Francisco, this first day of January, A. D. eighteen hundred and sixty, between Abraham Bolt, Benjamin B. Brewster and Charles C. Coleman, all of the city of San Francisco, witnesseth: that said parties have this day and do hereby associate themselves together as copartners in trade, in said city of San Francisco, under the firm name and style of Bolt, Brewster and Coleman, and do make and adopt the following covenants, provisions and articles of agreement with each other, respecting their said copartnership and the business to be conducted by them, viz.:

1st. The said copartnership shall continue for the space of three years from the date hereof, but after the expiration of one year from the date hereof, either partner shall be at liberty to terminate the said copartnership by giving to his copartners three months' previous notice in writing of his intention so to do.

2d. The said copartners shall contribute to the capital stock of said copartnership as follows: the said Bolt and Coleman, at least ten thousand dollars each, and the said Brewster, at least five thousand dollars in cash. The parties contributing the largest amount of capital shall be allowed an interest thereon to the extent of the excess over that contributed by the other partner or partners, which interest shall be at a rate equivalent to the average of the rates that shall have been paid by the firm in the course of their business, during the three months preceding the time when such interest is credited and allowed; an interest account shall be made up and allowed once in every three months, and shall be paid as one of the expenses of the business. And if said firm shall have paid no interest within the three months preceding the time when such account shall be made up, then the rate to be allowed shall be the average of the usual rates charged at bank, upon discount of the most approved mercantile paper during that period.

3d. The partners shall share the profits of their said business equally.

4th. The said copartnership engaged in the general grocery provision and liquor business, and the character of the business shall not be changed without the consent of all the partners thereto in writing.

5th. No partner shall sign or use the firm name for any purpose not connected with their legitimate business, and shall not sign or endorse any promissory note, bond, obligation or agreement, nor become surety for the benefit or accommodation of any person whatever, without the consent, in writing, of his copartners.

6th. Each partner shall devote his exclusive attention to the business of the firm, and shall engage in no other business or transaction whatever, but this shall not be held to prevent either partner from employing his private means in any investment or transaction he may please, provided, however, he do not employ or invest them in any business or transaction that may compete with the business and interests of the copartnership.

7th. Each partner shall consult his copartners in reference to all transactions connected with the business, as often as practicable, and if practicable to advise and consult with his copartners, neither party shall make any purchase exceeding twenty thousand dollars, without the consent of such partners, nor any sale and delivery on credit exceeding two thousand dollars, without the like consent.

8th. The said Bolt and Coleman shall be allowed to draw from the profits of the concern an amount not to exceed six hundred dollars a month, and the said Brewster not to exceed four hundred dollars a month, for their personal expenses.

9th. The profits of the concern shall be suffered to remain in the business, and no part of the same shall be withdrawn except the allowance and personal expenses as aforesaid, except by consent of all parties.

10th. Full, true and perfect books of accounts shall be kept, to which either partner shall have access at all times; balances shall be struck and balance sheets shall be made out as often as once in every three months, at which time each partner shall be entitled to be credited with his share of the earned profits of the business not withdrawn, as an increase of his capital.

11th. Upon a dissolution of the copartnership, any excess of capital which one partner may have invested in the concern, shall be first paid, and after that, the property of the concern shall be equally divided between the partners.

In witness whereof, the said parties to these presents have signed hereto, and to two others of like tenor and date, the day and year first mentioned.

ABRAHAM BOLT.

B. B. BREWSTER.

CHAS. C. COLEMAN.

TONG

*Partnership Agreement in Theatre Matters.*

This agreement, made this first day of January, in the year one thousand eight hundred and fifty-nine, between A., of the one part, and B., of the other part, both of the city and county of San Francisco, in the state of California, witnesses:

That the said parties, in consideration of their mutual trust and confidence in each other, and of the covenants and conditions hereinafter contained, have agreed each with the other to form, and they do hereby form, a copartnership, for the purpose of carrying on in the said state the business of , and the public performances and amusements generally known and designated by that name, upon the following terms and conditions:

1. Said copartnership shall commence , and will continue for the period of years.

2. Each party shall contribute to the capital stock of said copartnership equally.

3. The said B. shall, during the months of April or May, 1859, proceed to the Atlantic states, and there select and employ, on behalf of the said copartnership, according to his best judgment and discretion, a company of suitable persons as performers in said business, with whom he will return to this state as speedily as possible.

4. The style and firm of said copartnership shall be A. and Co., and their company of performers shall be known as A. and Co.'s Minstrels.

5. The interests of said parties in said copartnership shall be

equal. The profits shall be divided equally between them, and the losses, if any, shall be borne in the same proportion.

6. The said B. shall receive and disburse all the moneys of the concern, and shall well and truly keep the accounts thereof. Both parties shall have at all times free access to all the books and papers of the copartnership.

7. Neither of the said parties hereto will, without the consent in writing of the other, employ any of the moneys or effects of the said copartnership, or engage the credit thereof, except upon the account, in the business, and for the benefit of the said copartnership. Nor will either employ (except as in article 8, hereinbefore provided) or dismiss any person, for the purposes or business of said copartnership, without the written consent of the other.

8. The said copartnership shall have the right to play at least three engagements, or series of performances of a week each in duration, at the public concert room or theatre in the city of San Francisco, known as the Yerba Buena Theatre. And the said A. (party to this agreement) shall, as the proprietor of said theatre, be bound to, and he thereby covenants that he is such proprietor, and that he will let and hire to the said copartnership, the use of said theatre during said periods, upon receiving from said copartnership a notice of at least five days previous to the commencement of every such engagement, at a rent not to exceed ten dollars (\$10) per night, to be paid to said A. out of the receipts of such copartnership before dividing any profits.

9. A settlement shall be had monthly, at which all the accounts shall be made up, and the net profits remaining after paying all expenses shall be divided.

10. Either partner violating this agreement or any of the covenants therein contained, shall thereby become liable to the other in the full sum of ten thousand dollars (\$10,000) as fixed and liquidated damages, without deduction or diminution.

In witness whereof, the said parties have hereunto set their hands and seals the day and year first above written.

[L. s.]

[L. s.]

*General Copartnership.*

YY

Articles of agreement, made this first day of May, one thousand eight hundred and fifty-nine, between James Hunt, of the one part, and Charles Hunter, of the other part, witnesseth, as follows: The said parties above named have agreed to become copartners in business, and by these presents do agree to become copartners in business together, under and by the name, or firm of Hunt and Hunter, in the business of groceries and provisions, and in buying, selling and vending all sorts of goods, wares and merchandise, to the said business belonging, and to occupy the

store No. 213 Battery street, in the city of San Francisco, their copartnership to commence on the first day of June, 1859, and to continue for the term of ten years from thence next ensuing, fully to be complete and ended; and to that end and purpose, the said James Hunt and Charles Hunter, have delivered in, as capital stock, the sum of fifty thousand dollars, share and share alike, to be used and employed in common between them, for the support and management of the said business, to their mutual benefit and advantage.

And it is agreed, by and between the parties to these presents, that at all times during the continuance of their copartnership, they and each of them, will give their attendance, and do their and each of their best endeavors, and to the utmost of their skill and power exert themselves, for their joint interest, profit, benefit and advantage, and truly employ, buy and sell merchandise, with their joint stock, and the increase thereof, in the business aforesaid; and, also, that they shall, and will, at all times, during their copartnership, bear, pay and discharge, equally between them, all rents and other expenses that may be required for the support and management of the said business, and that all gains, profits and increase, that shall come, grow, or arise, from or by means of their said business, shall be divided between them, the said copartners, share and share alike; and all loss that shall happen to their said joint business, by ill commodities, bad debts, or otherwise, shall be borne and paid equally between them. And it is agreed, by and between the said parties, that there shall be kept, at all times during the continuance of their copartnership, perfect, just and true books of accounts wherein each of the said copartners shall enter and set down, as well all money by them, or either of them, received, paid, laid out and expended, in and about the said business, as also all the goods, wares, commodities and merchandise, by them, or either of them, bought or sold, by reason or on account of the said business, and all other matters and things whatsoever, to the said business and management thereof, in anywise belonging; which said books shall be used in common between the said copartners, so that either of them may have access thereto. And also, the said copartners, once in each year, during the continuance of the said copartnership, as aforesaid (to wit:—on the first day of June, in each year), or oftener if necessary, shall make, yield and render, each to the other, a true, just and perfect inventory and account, of all the profits and increase by them, or either of them made, and of all loss by them, or either of them, sustained: and also, of all the payments, receipts and disbursements, and of all other things by them made, received, disbursed, acted or suffered, in their said copartnership and business, and the same account being so made, they shall and will, clear, adjust, pay and deliver, each to the

other, at the time, their just share of the profits so made as aforesaid, and the said parties hereby mutually covenant and agree, to and with each other, that during the continuance of the said copartnership, neither of them shall or will, endorse any note, or otherwise become surety for, any person or persons whomsoever, without the consent of the other of the said copartners. And at the end, or other sooner determination of their copartnership, the said copartners, each to the other, shall and will make a true, just and final account, of all things relating to their said business, and in all things truly adjust the same; and all and every stock and stocks, as well as the gains and increase thereof, which shall appear to be remaining, either in money, goods, wares, fixtures, debts, or otherwise, shall be divided between them, share and share alike.

In witness whereof, the said parties to these presents have hereunto set their hands and seals, the day and year above written.

Signed and sealed in presence of }  
HENRY JACKSON.

JAMES HUNT. [L. S.]

CHARLES HUNTER. [L. S.]

### *Farming Partnership Contract.*

Memorandum of an agreement made and entered into at the city of San Francisco, the            day of April, A. D. eighteen hundred and fifty-nine, between Mark Hillyer, of Contra Costa county, and George Hubert Kenny, and Albert L. Bancroft, of said city of San Francisco, witnesseth, that said Mark Hillyer, having this day conveyed to the other parties above named, the two-thirds part of a tract of land in said Contra Costa county, described as follows, viz.: [*insert description.*] The said Mark Hillyer and the said other parties above named, have become and now are the owners of the same, and of the stock, personal property, and improvements thereon, each of an undivided one-third of the same, as tenants in common, and not as joint tenants, and they have agreed upon the following terms and articles of association, for the possession and improvement of said property:

The said parties agree to continue together in the business of raising cattle, horses, and other stock, upon the land aforesaid, for the period of five years from the date hereof, and they shall be equally entitled to the increase and profits arising from the same. The dwelling-house and its appurtenances, now occupied by the said Mark Hillyer, shall not be deemed to be the common property of the said parties, but shall belong exclusively to said Hillyer, and either of the other parties is at liberty to erect a dwelling-house upon the said tract of land for his own use, which shall, in like manner, belong to the party so erecting the same, and not be deemed the common property of the parties hereto.

All business transacted by any of said parties respecting their common affairs, shall be done with the knowledge and consent of the other associates; all sales shall be made for cash, and no purchases whatever shall be made, except for cash. No promissory note, or other obligation, shall be signed or endorsed by any of the associates, in reference to matters affecting their common interest, except by the unanimous consent of all. Each of the associates shall be required to give his personal attention and services to the business and affairs of the association, or to be represented by other labor in his place, or to make some equivalent therefor. A suitable garden spot may be selected and fenced in by either of the parties, and attached to his residence, which, however, shall not exceed                      acres in extent, and the product thereof shall not be deemed or taken to be common stock, so far as the same may be used or employed in the maintenance or support of such person or his family; but the proceeds of all crops or produce sold, shall belong to the associates. Neither of the associates shall draw from the funds of the association more than fifty dollars per month, for his personal use, and all marketable produce taken from the common stock or general farm for the private use or consumption of either of the associates, shall be charged to and accounted for the person who shall have taken the same.

In witness whereof, &c.

*Agreement to make a Partnership at a future day.*

This agreement made the                      day of January, one thousand eight hundred and fifty-nine, by and between A. B., of the first part, and C. D., of the second part, both of the city and county of San Francisco, state of California, witnesses:

The said parties mutually covenant, promise and agree, to and with each other, that at any time from and after the expiration of four months from the date of this agreement, they, the said parties, shall and will, upon five (5) days' notice in writing from either to the other, enter into and execute written articles of copartnership (under seal) to carry on the business of                      at the city of Chicago, in the state of Illinois, and in the western states of the United States of America generally; said articles of copartnership to go into effect as soon after the execution thereof as may be; the term of the said copartnership to be not less than five (5) nor more than ten (10) years from the date of said articles, fully to be complete and ended;

That the firm name of said copartnership shall be A. B. & Co., the profits to be divided equally, and any losses, if such there be, to be borne by said parties equally; that at all times during the continuance of their said copartnership, the said parties, and each



of them, shall and will give their attendance, and do their and each of their best endeavors, and to the utmost of their skill and power, exert themselves for their joint interest, profit, benefit, and advantage in the business aforesaid, that the said A. B. shall have the charge, direction, and control of the business department of said copartnership.

And the parties also further mutually covenant, promise, and agree to and with each other, that this agreement shall be and remain in force for five years from the date thereof; and for the true and faithful performance of all the covenants and agreements above mentioned, the parties to these presents, now this day executed and delivered, each to the other, bonds in the sum of \$ , as fixed and settled damages to be paid by the failing party, which said bonds are hereto annexed and form part of this agreement.

A. B. [L. s.]

C. D. [L. s.]

*Agreement to determine Partnership Disputes by Arbitration.*

This agreement, made and entered into this            day of February, A. D. one thousand eight hundred and sixty, between Amos Lawrence of the first part, Freeman Hunt of the second part, and Cyrus W. Field of the third part, all of the city and county of San Francisco.

Whereas, the said parties hereto, of the first and second parts, were, for a long time prior to the            day of            , 1856, engaged and concerned together as copartners, which partnership was dissolved.

And, whereas, for the purpose of compromising, finally ending, and absolutely determining, all differences, controversies, actions, suits, debts, accounts, and demands whatsoever, had, made, moved, depending, arising, or accruing, or which at any time or times may be had, or by, or between said parties of the first and second parts, to these presents, for or by reason or means of the accounts of said copartnership, or of any matter or thing relating thereto, resulting therefrom, or otherwise howsoever, it hath been covenanted by said parties to refer all such differences of accounts to the party hereto of the third part for arbitration and adjustment, and the said party of the third part has consented to become such arbitrator.

Now this agreement witnesseth, that the said parties of the first and second parts to these presents do hereby mutually covenant and agree, to and with each other, that the said party of the third part shall arbitrate, award, order, judge and determine of and concerning all, and all manner of actions, cause and causes of actions, suits, controversies, claims and demands whatsoever, relating to, or growing out of their copartnership accounts prior to the            day of            , 1854, and shall conclude

such arbitration, and make award and deliver the same to either of said parties of the first or second part in three months from this day, and said parties of the first and second part mutually agree to abide by the said award in all things.

Dated, &c.

(Signed) &c.

*Agreement to Renew Partnership, to be Endorsed on Original Article.*

Whereas, the partnership formed by, and mentioned in, the within article of agreement, has this day expired [or, will expire on the            day of            next] by the limitations contained herein: it is therefore hereby agreed, that the same shall be continued, on the same terms, and with all the provisions and restrictions in said agreement mentioned, for the further term of            years from this date, [or, from the            day of            next.]

Witness our hands and seals, this	day of	18
In presence of {		A. B. [L. s.]
G. H. }		C. D. [L. s.]

*Agreement of Dissolution, to be Endorsed on the Original Articles.*

By mutual consent of the undersigned, the parties to the within agreement, the partnership thereby formed is wholly dissolved, except so far as it may be necessary to continue the same for the final liquidation and settlement of the business thereof; and said agreement is to continue in force until such final liquidation and settlement be made, and no longer.

Witness, &c.

*Agreement to make Changes in a Copartnership.*

This agreement, made this            day of            , A. D.            , between A. B., of the one part, and C. D., of the other part, witnesseth:

Whereas, on            , the said A. B. and C. D. entered into and made by agreement in writing, a copartnership, under the style and firm of A. B. & Co., for the purpose of carrying on a general fancy dry goods business in            , which partnership was, by the terms of such agreement, to expire on            ;

And whereas, it is thought best by said A. B. & Co., that the said agreement of copartnership should be modified as to the period fixed for the expiration thereof, and in other respects, as hereinafter set forth; and whereas, the said C. D. is desirous of making with the said A. B. an agreement for the selling out, at a future period, to said A. B., he, said C. D., of all his right,

title, interest and share in the said copartnership, and in the stock, assets and property of every kind thereto belonging, as hereinafter set forth;

Now, therefore, the said A. B. and C. D. mutually agree with and to each other, as follows:

I. On \_\_\_\_\_, the sum of \_\_\_\_\_ dollars shall be placed to the credit of said C. D., upon the books of A. B. & Co., which sum shall be paid out of the concern to him at any time within two years from that date, in amounts of not less than one thousand dollars at a time, together with interest at one and a half of one per cent. per month, until paid.

II. There shall also be paid to said C. D. from and after said \_\_\_\_\_, the sum of \_\_\_\_\_ dollars per month, payable monthly, so long as the said sum of \_\_\_\_\_ dollars, with interest as aforesaid, shall remain unpaid.

III. Upon the payment to said C. D. of the sum of money as in article I. and II. mentioned, the same shall be in lieu and in full to him of all his right, title and interest in and to the said copartnership of A. B. & Co., and the stock, good-will, firm-name, assets and property of every kind whatever, thereunto belonging, and the same shall fully vest in and belong to the said A. B., and all interest, right and title of the said C. D. shall then and thereby wholly cease and determine, and the said copartnership of the said A. B. and the said C. D. shall then and thereby expire and be dissolved.

IV. That in the mean time, and until the contingency as provided and set forth in article III. shall have taken place, the said C. D. shall continue to give his whole time and attention to the said copartnership of A. B. & Co., and to the business and affairs thereof, under and subject to the control and management of the said A. B., so long as he shall be present and able to act. At all times during said period, the said C. D. shall have full and free access to the book accounts and papers of said copartnership.

V. The payment to the said C. D. of the sum of money in articles I. and II. mentioned, shall be in lieu and in full to him, of all his share or interest of and in the profits of the said copartnership, A. B. & Co.

VI. In the event of the death of said C. D. before \_\_\_\_\_, A. D. \_\_\_\_\_, the said sum of \_\_\_\_\_ dollars, with interest as aforesaid, or so much thereof, as shall at the time of his death be unpaid, shall be paid on or before \_\_\_\_\_, as aforesaid, to the heirs, executors, administrators or legal representatives of said C. D., and when paid, shall be in lieu and in full to the said heirs, executors, administrators and legal representatives, of all

their and any of their right, title and interest of, in and to, as in article III.

But in the event of such death, the payment of the sum of \_\_\_\_\_ dollars per month, as in article II. provided, shall cease, and the heirs, executors, administrators or legal representatives shall have no control, right, interest or title of any kind, of, in or to the said copartnership or its affairs, business, property or interests, of whatever kind, except the right of access, at reasonable times, to the books, accounts and papers of the copartnership, and of \_\_\_\_\_, and examining the same; and the said A. B. shall give to the heirs, &c., of said C. D., good and sufficient security for the performance of the agreement and conditions in this article VI. contained, or else the same shall be of no effect or force.

VII. In the event of the death of said A. B. before \_\_\_\_\_, leaving the said C. D. him surviving, then, and in that case, the said C. D. shall pay to the heirs, executors, administrators or legal representatives of said A. B., within the period of \_\_\_\_\_ from the date of such death, the sum of \_\_\_\_\_ dollars, together with \_\_\_\_\_ per month, until paid, in sums of not less than \_\_\_\_\_ dollars. And upon payment by the said C. D. of said sum of money, as aforesaid, the same shall be in lieu and in full to the heirs, executors, administrators or legal representatives, of all their or any of their right, title and interest of, in and to the said copartnership of A. B. & Co., &c., &c. And the heirs, executors, &c., of the said A. B., shall have no right, &c., [copy as in article VI., omitting any reference to the \_\_\_\_\_ dollars per month.]

And the said C. D. shall give to the heirs, &c., good and sufficient security, &c., [as in article VI.]

In witness whereof, the parties hereto have signed and sealed this agreement, the day above named.

A. B.  
C. D.

*Agreement of Limited Copartnership, in accordance with the Act of the Legislature of California of April 4th, 1850.*

Articles of agreement made and concluded this first day of January, A. D. one thousand eight hundred and fifty-nine, between William Richards, of the city of San Francisco, of the first part, John Dean, of said city, of the second part, and James Brown, of the city of Sacramento, of the third part.

The said parties to these presents do hereby agree to associate themselves together, in a limited partnership, for the purpose of carrying on, in the city of San Francisco, the art and trade of manufacturing, purchasing and selling native California wines, under the name and style of Richards and Dean; the said Wil.

liam Richards and John Dean being general partners, and the said James Brown a special partner; that said copartnership shall commence at and on the date of these presents, and terminate on the thirty-first day of December, A. D. one thousand eight hundred and sixty-two; that the said William Richards, as a general partner, has contributed in cash [*or otherwise, as the case may be*] the sum of twenty thousand dollars: that the said John Dean also, as a general partner, has contributed the sum of twenty thousand dollars: and the said James Brown, as a special partner, has contributed also the sum of twenty thousand dollars to the capital stock of the said firm.

It is further agreed by and between the parties to this agreement, that the interest in the capital stock aforesaid, of each of the partners, shall be the one-third of the yearly profits of the business of said firm.

And it is further mutually understood and agreed by and between the parties hereto, that if any one of the respective parties desire the portion of the annual profits to which he may be entitled to remain with said firm, for the mutual use and benefit of all the parties to this agreement, then and in that case, the portion of the profits so remaining shall draw interest at the rate of fifteen per cent. per annum, which said interest shall be paid to the party entitled thereto, on the first day of July thereafter in each and every year, during the term of this agreement.

And it is further agreed by and between the parties to this agreement, that William Richards and John Dean shall and will, from time to time, and at all times during the said term (if they shall so long live), devote their personal services, skill and ability to the business of said firm, and for the mutual benefit of all the parties to this agreement, and as a compensation for said services the said William Richards and John Dean shall each be allowed a salary of one hundred and fifty dollars per month, to be drawn from the profits of said business, on the first day of each and every month during the term of this agreement.

And it is further agreed by and between the parties to this contract, that the said general partners shall, during the term of copartnership, keep true and just books of accounts, in which shall be entered all moneys received and expended in and about the business of said firm, to which books each of the respective parties hereto shall have free access.

And also, on the thirty-first day of December, in each and every year during the term of said copartnership, a general account shall be stated of all profits made and losses sustained by said firm; and further, upon making the said account at the expiration of the term hereof, a copy of said account shall be furnished to each of the parties to this agreement, his executors, administrators, or assigns; and, at the same time, all the capital stock, together

with the profits thereof, shall be divided between the said parties, their executors, administrators, and assigns, in the proportions first above mentioned, to wit: one-third to each and every one of the parties hereto.

And it is further agreed, by and between the parties to this agreement, that, during the term hereof, no one of the parties hereto shall pledge his individual liability for or on behalf of any person or matter beyond the business of this copartnership.

In witness whereof, the parties to these presents have hereunto set their hands and seals, the day and year first above written.

Signed, sealed, and delivered	{	WILLIAM RICHARDS.	[L. S.]
in presence of		JOHN DEAN.	[L. S.]
		JAMES BROWN.	[L. S.]

*Certificate of Limited Partnership, in accordance with the said Act.*

This is to certify, to all to whom these presents shall come, that we, whose names are hereunto severally subscribed, have entered into a limited partnership, within the state of California, under, and by virtue of an act of the legislature of said state (and the supplements thereto), passed the fourth day of April, A. D. 1850, entitled, "An Act to authorize the formation of Limited Partnerships," upon the terms and liabilities hereinafter set forth, to wit:

1. The said partnership is to be conducted under the name and style of Richards & Dean.

2. The names of the general partners in the said firm are William Richards and John Dean, both residents of the city of San Francisco, state of California, and the special partner is James Brown, of the city of Sacramento, state aforesaid.

3. The said special partner, James Brown, has contributed to the capital stock of said firm the sum of twenty thousand dollars.

4. The general nature of the business to be transacted by the said firm is the manufacturing, purchasing, and selling native California wines.

5. The said partnership is to commence immediately at and after the signing of this certificate, and is to terminate on the thirty-first day of December, A. D. one thousand eight hundred and sixty-two.

Made and severally signed by the said partners, at the city of San Francisco, the first day of January, A. D. one thousand eight hundred and fifty-nine.

WILLIAM RICHARDS.  
JOHN DEAN.  
JAMES BROWN.

*[Acknowledged by all the partners in due form.]*

*Affidavit of Publication on Foregoing Certificate.*

City and County of San Francisco, ss :

John Pope, being duly sworn, says, that he is a printer [or, publisher, or, clerk, &c.], of the *San Francisco Builder*—a daily newspaper, printed and published in the city and county of San Francisco—and that the annexed certificate has been published in said paper daily for three successive weeks, commencing on the 2d day of January, 1859, and ending this 23d day of January, 1859.

JOHN POPE.

Sworn before me, January 23, 1859, }  
CHAS. HALSEY, Notary Public. }

## CHAPTER XXXIII.

## POWER OF ATTORNEY.

A POWER of attorney, or as it is sometimes called, a letter of attorney, is an instrument in writing, by one person who is called the principal, authorizing another who is called his attorney-in-fact, to perform some act for or instead, and in the name of the principal.

When it authorizes any act affecting real estate or any act which if done by the principal would require seal, the power should be under seal.

The authority may be general, to transact all the business of the principal, or special, to do some particular act.

If the attorney exceeds his authority the principal is not bound by his act; but the authority delegated to him is supposed to include all the necessary means of carrying it into effect.

When the attorney performs an act for his principal it must be done in the name of the principal, and all instruments must be so expressed, and must be signed in the name of the principal by the attorney.

A power of attorney to convey real estate, or to execute any conveyance affecting real estate, must be acknowledged or proved, certified and recorded, the same as a deed. See chapter on DEEDS and ACKNOWLEDGMENTS. To revoke such a power of attorney, the deed of revocation must be deposited for record in the same office in which the power of attorney is recorded.<sup>1</sup>

A power may be revoked at the sole pleasure of the principal, except where the attorney or some third party has an interest in the subject matter.

Under the statutes of California regulating the execution of instruments by married women, it is questionable whether they

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<sup>1</sup> Wood's Dig. art. 264, 265, 2993.



can authorize an attorney to convey their separate estate. See DEED, ACKNOWLEDGMENTS, and HUSBAND AND WIFE.

The power of attorney may contain authority to the attorney to appoint a substitute; and such substitute if appointed must act in the name of the principal.

#### JUDICIAL DECISIONS.

General words in powers of attorney are limited and controlled by particular terms and designations.<sup>1</sup>

A deed not executed in pursuance of a power, does not pass any title to the grantee, and as between the attorney and the grantee is a nullity. A power to "sell and convey" property is special, and must be strictly pursued; no presumption of a ratification of an alleged sale under a power can be indulged, unless knowledge of the alleged sale, with its attendant circumstances, is brought home to the grantee of the power.<sup>2</sup>

A general ratification of all the acts of an attorney does not include acts not within the scope of his power. The principal who ratifies, must know the character of the acts to be ratified: otherwise the ratification is void.

The principal is not bound to notice recorded conveyances executed in his name by his attorney, not authorized by the power.<sup>3</sup>

Where authority to perform specific acts is given by a power of attorney, and general words are also employed, such words are limited to the particular acts authorized. A power to sell real estate must be so expressly stated.<sup>4</sup>

#### OREGON AND WASHINGTON.

In *Oregon* the statute provides for recording powers of attorney and revocations, in the same terms as the California statute.

There seems to be no statutory provisions in *Washington Territory* upon the subject of powers of attorney.

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<sup>1</sup> 5 Cal. 463.

<sup>2</sup> 7 Id. 171.

<sup>3</sup> 10 Id. 264.

## FORMS.

*Power of Attorney—short Form.*

I, A. B., hereby appoint and constitute C. D. my attorney in fact, in my name, place and stead, to [*here state what the attorney is authorized to do*] with full power to said C. D., as my attorney to do every thing I could in the premises, if personally present.

Witness my hand and seal this 1st day of May, 1859.

A. B. [L. S.]

*Another Form.*

I hereby authorize A. B. as my attorney in fact, to sell and transfer for me and in my name, my interest in the grist-mill in Santa Clara county, located on the Guadalupe River, with the lease of the land, to whom, and on such terms as he deems best; and by such instrument or means, as may be agreed on between him and any other parties.

GEORGE BURR.

August 5th, 1858.

*Power to Collect.*

Know all men by these presents: That I, A. B., of the county of Fresno, state of California, have made, constituted, and appointed, and by these presents do make, constitute, and appoint C. D. of Sacramento, true and lawful attorney, for me and in my name, place and stead, to demand, ask for, receive, and recover, all and singular, such sum or sums of money, goods, wares, merchandise debts, dues, choses in action, and effects whatsoever as are now due, payable, belonging, or coming unto me from any person or persons, or body or bodies corporate whatsoever, giving and granting authority to sue therefor, in part or in whole, and pursue unto final judgment and execution any process or suit, as he may deem expedient for the recovery of the same, with power to sign one or more sufficient undertakings, if by law required.

And my person to represent in any court or courts of law, and there to plead for or retain counsel for that purpose, to submit to arbitration or to compound the same, and to execute good and sufficient receipts and acquittances therefor, and the same to continue in force unless otherwise revoked.

Giving and granting unto my said attorney full power and authority to do and perform all and every act and thing whatsoever, requisite and necessary to be done in and about the premises, as fully to all intents and purposes as I might or could do if personally present, with full power of substitution and revocation, hereby ratifying and confirming all that my said attorney, or his substitute, shall lawfully do or cause to be done by virtue hereof.

In witness whereof, I have hereunto set my hand and seal,  
 the       day of       , one thousand eight hundred and sixty.  
 Signed, sealed, and delivered }       A. B. [L. S.]  
 in presence of       }

*Power of Attorney to Sell and Manage Real Estate.*

Know all men by these presents: That I, Frank W. Gross, of the city and county of San Francisco, state of California, have made, constituted, and appointed, and by these presents do make, constitute, and appoint James P. Garvey, of the same place, my true and lawful attorney, for me and in my name, place, and stead, to enter into and take possession of all real estate that I now own or may hereafter acquire in the state of California, and to lease the same, from time to time, upon such terms and conditions, and for such rent as he may deem expedient; and to collect and receive the rents thereof; and also to sell and convey my said real estate, or any part thereof, for such price and upon such terms and credits as he may deem expedient, and also to borrow money for my use upon such terms and interest as he may deem advisable, and as security for the repayment of the same, to mortgage and pledge my said real estate, or any part thereof. And for the purposes aforesaid, I hereby authorize and empower my said attorney to make, execute, and deliver all requisite leases, deeds, promissory notes, bonds, agreements, mortgages, or other instruments under seal or otherwise, giving and granting unto my said attorney full power and authority to do and perform all and every act and thing whatsoever, requisite and necessary to be done in and about the premises, as fully, to all intents and purposes, as I might or could do if personally present, with full power of substitution and revocation, hereby ratifying and confirming all that my said attorney, or his substitute, shall lawfully do or cause to be done by virtue hereof.

In witness whereof, I have hereunto set my hand and seal, the tenth day of June, in the year of our Lord one thousand eight hundred and fifty-nine.

FRANK W. GROSS. [L. S.]

*Full Commercial Power, with Authority to Sell, &c., Real Estate.*

Know all men by these presents, that I, A. B., of       , have made, constituted and appointed, and by these presents do make, constitute and appoint C. D., of       , my true and lawful attorney, for me, and in my name, and on my behalf, to ask, demand, recover and receive, all and any sum or sums of money, debts, dues, merchandise or effects, due, payable, coming or belonging, or which may at any time be due, payable or

belonging to me, from any person or persons whatsoever; to sell all or any part of such goods, merchandise and effects which may come to his possession or knowledge, on such credit and for such prices as he may deem meet; to purchase any goods, merchandise, specie or other commodities on my account, for such prices and to such amount as he may deem meet, and the same to sell again for my benefit and on my account, for any prices whatsoever, to ship or transport the same, or any part thereof, on my behalf and account, to any port or posts, place or places whatsoever, in any vessel or vessels, and with and to any person or persons whatsoever, and there barter, exchange and dispose of the same; to insure and cause insurance to be made, of any such goods, merchandise, specie or other commodities, or of any part thereof, at such premiums and for such risks as he may deem meet; to except any bill or bills of exchange or orders, make and execute any note or notes of hand, bond or bonds, or other instruments or contracts, in my name and on my account, to and for any amount which he may deem meet or expedient; to sell, barter, exchange or dispose of any real estate of which I am now seized or possessed in fee simple, or for any less estate, to any person or persons, for any price or in any manner whatsoever, and for these purposes to execute and acknowledge any deed or deeds, lease or leases, or other assurance or assurances, with general covenants of warranty against all persons, or any other covenants whatsoever, as he may deem expedient; to purchase any real estate on my account, in fee simple or otherwise, at any price or any exchange whatsoever, and for these purposes to receive, confirm, make and execute any contracts, deeds, conveyances or other instruments whatsoever; to settle and adjust all partnership accounts and demands, and all other accounts or demands now subsisting, or which may hereafter subsist between me and any person or persons whatsoever, and submit the same to and decide them by arbitration; to compound for any debts, dues or demands owing, or which may hereafter be owing to me, and to take less than the whole, or otherwise to agree for the same, in such manner and on such terms as he, in his discretion, may deem proper; and for all or any of these purposes, to make and execute any releases, compromises, compositions, agreements or contracts, by deed or otherwise, in his opinion necessary and expedient in the premises; to pay and discharge all debts and demands due and payable, or which may hereafter become due and payable by me unto any person or persons whatsoever; to enter into any lands or other real estate to which I am or may be entitled, and recover the possession thereof, and damages for any injury done thereto, and to distrain for rent due thereon, and also to commence and prosecute unto final judgment and execution, any suit or suits, action or actions, real, personal or mixed,

which he shall deem proper for the recovery, possession or enjoyment of any matter or thing which is or which may hereafter be due, payable, owing, belonging, accruing or appertaining to me, for or by reason of the premises, or any part thereof, and in any such suits or actions, for me to appear and plead, before any courts or tribunals having jurisdiction thereof, and all stipulations, undertakings, recognizances, and other requisites in any suits or actions, and any question arising on the same, by arbitration or other compromise, and of all receipts and recoveries in the premises, due acquittances and discharges to execute and deliver, and generally to do and perform all matters and things, transact all business, make, execute and acknowledge all contracts, orders, deeds, writings, assurances and instruments which may be requisite or proper to effectuate all or any of the premises, or any other matter or thing appertaining or belonging to me, with the same powers, and to all intents and purposes with the same validity as I could, if personally present; [giving and granting unto my said attorney, full power to substitute one or more attorney or attorneys under him, my said attorney, in or concerning the premises, or any part thereof, and the same at his pleasure to revoke; and] hereby satisfying and confirming whatsoever my said attorney [or, his substitute or substitutes] shall and may do, by virtue hereof, in the premises.

In witness whereof, I have hereunto set my hand and seal, this  
                     day of                     , in the year of our Lord one thousand  
 eight hundred and                      A. B. [L. s.]

Signed, sealed and delivered }  
 in the presence of }  
                     JAMES BROWN.  
                     PETER STILES.

*Authority to receive Legacy &c.*

Know all men by these presents, that I, A. B., of                     , have made, constituted and appointed, and by these presents do make, constitute and appoint C. D., of                     , my true and lawful attorney for me and in my name, place and stead, and for my use to ask, demand, sue for, collect, recover and receive all money and all other property of every nature and kind whatsoever, both real and personal (with power to enter into and take possession of all lands, tenements, hereditaments and real estate whatever) which may have descended to me as heir of, or to which I may be entitled as next of kin of A. B., late of New York in said state of New York, deceased, my late father, and to give all necessary receipts, acquittances, releases and discharges in the law, with or without seal, for the same, and to appear for me in all courts and places, and before

all officers, tribunals and magistrates, to prosecute, defend, settle and compromise all suits, actions and proceedings of every nature and kind in relation thereto, giving and granting unto my said attorney full power and authority, to do and perform all and every act and thing whatsoever, necessary and requisite to be done in and on the premises, as fully to all intents and purposes as I could or might do.

*Stock Powers of Attorney.*

Know all men by these presents, that I, A. B., of the city and county of San Francisco and state of California, for value received, have and do hereby grant, bargain, sell, assign, transfer and set over unto C. D., of Grass valley, Nevada county, fifty shares in the capital stock of the Empire Mining Company of Grass Valley, belonging to me, and standing in my name on the books of the said company, and I do hereby constitute and appoint N. N. my true and lawful attorney irrevocable, to assign, and in due form of law transfer, the said stock unto the said C. D., and to do all other lawful acts requisite for effecting the premises, hereby ratifying and confirming all that my said attorney shall do by virtue hereof.

In witness whereof, I have hereunto set my hand and seal the day of \_\_\_\_\_, one thousand eight hundred and fifty-nine.  
 Sealed and delivered in } A. B. [L. s.]  
 presence of }

*Revocation of Power of Attorney.*

Know all men by these presents, that I, A. B., of San Francisco, in and by my letter, warrant or power of attorney, bearing date on the \_\_\_\_\_ day of \_\_\_\_\_ A. D. 1859, did make, constitute and appoint C. D. of the same place my true and lawful attorney, for the purposes and with the powers therein set forth; as will more fully and at large appear by reference thereto, or to the record thereof, made on the \_\_\_\_\_ day of \_\_\_\_\_ A. D. 1859, in liber \_\_\_\_\_ of Powers of Attorney, page \_\_\_\_\_ in the county recorder's office, of \_\_\_\_\_ county.

Now know ye, that I the said A. B., for divers good causes and considerations me hereunto moving, have revoked, countermanded, annulled and made void, and by these presents do revoke, countermand, annul, and make void, the said letter, warrant or power of attorney, and all power and authority thereby given, or intended to be given to the said C. D.

In witness whereof, I have hereto set my hand and seal at the \_\_\_\_\_ of \_\_\_\_\_ this \_\_\_\_\_ day of \_\_\_\_\_ A. D., the year of our Lord one thousand eight hundred and sixty.

A. B. [L. s.]

## CHAPTER XXXIV.

## PUBLIC OFFICERS.

## STATUTORY PROVISIONS.

ALL public officers, except the secretary of state, notaries public, and some few officers of a special character, are chosen to office by popular election.

When township or county officers are elected, it is the duty of the county clerk, after the election returns are complete, to furnish to each officer elected, a certificate of election under his hand and the seal of the county court.

In the case of the election of county clerk, the county judge examines the returns and issues a certificate of election.<sup>1</sup>

When district officers are elected, the returns are made to the county clerk of that county of the district standing first in alphabetical arrangement, who issues the certificates of election, and transmits a certified copy of the returns to the secretary of state.<sup>2</sup>

When state officers are elected, the returns are made by the respective county clerks to the secretary of state, who transmits a statement of the vote to the governor, upon which the commissioners issue.<sup>3</sup>

When representatives to Congress are elected, the governor furnishes the certificate of election, sealed with the seal of the state, and attested by the secretary of state.<sup>4</sup>

The returns of election for governor and lieutenant-governor are made to the speaker of the Assembly, who opens and publishes the same during the first week of the session, in presence of both houses.<sup>5</sup>

All commissions of officers shall be in the name and by the authority of the people of the state of California, sealed with the

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<sup>1</sup> Wood's Dig. art. 2144, 2145.

<sup>2</sup> Id. 2146, 2147.

<sup>3</sup> Id. 2148.

<sup>4</sup> Id. 2152.

<sup>5</sup> Id. 2153, 2154.

great seal of the state, signed by the governor and countersigned<sup>1</sup> by the secretary of state.<sup>1</sup>

Every officer chosen or appointed to any office of trust or profit under the authority of this state, before entering upon his office must take and subscribe the oath (or affirmation) of office, (see *Forms*,) which may be taken and subscribed before any judge of the Supreme or District Court, or clerk thereof, county judge or clerk, notary public or justice of the peace: and, except in case of members of the legislature, the governor or lieutenant-governor must be endorsed upon the commission or certificate, within ten days after the reception of his commission or certificate, or within ten days after the commencement of his term of office, if he has received his commission or certificate. Deputies must take the same oath as the principal.<sup>2</sup>

No certificate shall be withheld on account of any defect or informality in the return of any election, if it can with reasonable certainty be ascertained from such return what office is intended, and who is entitled to such certificate; nor shall any commission be withheld by the governor on account of any such defect or informality of any returns made to the office of the secretary of state.<sup>3</sup>

Every officer of this state, civil and military, commissioned by the governor, is required, on receipt of his commission, to pay the sum of five dollars to the secretary of state, for the benefit of the library fund.<sup>4</sup>

All official bonds, required by law, of officers, shall be in form, joint and several, and made payable to the state of California, in such penalty, and with such conditions as shall be required by law.<sup>5</sup>

The official bonds of officers shall be approved and filed as follows, to wit: the official bond of the secretary of state shall be approved by the governor, and filed and recorded in the office of the county clerk of the county in which the seat of government is fixed; the official bond of the attorney-general, surveyor-general, controller, treasurer, state printer and clerk of the Supreme Court, shall be approved by the governor, filed and

<sup>1</sup> Wood's Dig. art. 2565.

<sup>2</sup> \* Id. 2565-2570.

<sup>3</sup> Id. 2150.

<sup>4</sup> Id. 2791.

<sup>5</sup> Id. 210.



recorded in the office of the secretary of state; the official bond of each district attorney shall be approved by the judge of the district, filed and recorded in the office of the county clerk of any one of the counties in the district which may be designated by said judge; the official bonds of sheriffs, coroners, justices of the peace, and all other county officers, shall be approved by the county judge, filed and recorded in the office of the county clerk of their respective counties; the official bonds of county clerks shall be approved by the county judge and filed and recorded in the office of the county recorder.<sup>1</sup>

In the city and county of San Francisco, the bonds of the public officers of the county must be filed and kept in the office of the auditor. The auditor's bond must be filed and kept in the office of the county clerk. When the amount of any bond is not fixed by law, it must be fixed by the board of supervisors. The bonds and sureties must be approved by the county judge, the auditor and the president of the board of supervisors. The sureties may be examined under oath. Their requisite qualifications are fully set forth in the oath to be taken by them, for which see the forms at the end of this chapter.<sup>2</sup>

In all cases where official bonds are required, or may be hereafter required from state or county officers, the officer or officers whose duty it is, or may be, to approve such bonds, shall not accept or approve any such bond unless, in addition to the present requirements of the law, the sureties shall severally justify before an officer authorized to administer oaths as follows: 1. On a bond given by a state officer, that he is a resident and freeholder or householder within this state; and on a bond given by a county officer, that he is a resident and freeholder or householder within such county, or within an adjoining county. 2. That he is worth double the amount for which he becomes surety, over and above all his debts and liabilities, in unincumbered property, situated within this state, which may be levied upon, and is not exempt from execution and forced sale. And by the amendment of 1859, the county judge is authorized at any time afterward, to call upon any county officer for a further justification of his sureties.<sup>3</sup>

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<sup>1</sup> Wood's Dig. art. 205.

<sup>2</sup> Wood's Dig. art. 234; Laws 1856, p. 71.

<sup>3</sup> Laws 1856, p. 150; id. 1859, p. 141.

Unless otherwise provided, there shall be at least two sureties, upon the official bond of every officer.<sup>1</sup>

When the penal sum of any bond hereafter to be given, amounts to more than one thousand dollars, the sureties may become severally liable for portions not less than five hundred dollars of such penal sum, making in the aggregate at least two sureties, for the whole penal sum. And if any such bond shall become forfeited, an action may be brought thereon, against all or any number of the obligors, and judgment be entered against the obligors, either jointly or severally, as they may be liable; *provided*, that judgment shall not be entered against a surety severally bound for a greater sum than that for which he is specifically liable, by the terms of said bond. Each surety shall be liable to contribution to his co-sureties, in proportion to the amount for which he is liable.<sup>2</sup>

The approval of every official bond shall be endorsed thereon, and signed by the court or officer approving the same.<sup>3</sup>

No officer with whom any official bond is required to be filed, shall file and take charge of such bond until approved as prescribed by law.<sup>4</sup>

If any person, elected or appointed to any office, shall perform any of the duties thereof without having executed and filed in the proper office any bond required of him by law, he shall be deemed guilty of a misdemeanor, and on conviction thereof, shall be fined in a sum not exceeding one thousand dollars, and his office be declared vacant.<sup>5</sup>

Every official bond executed by any officer pursuant to law, shall be deemed and taken to be in force, and obligatory upon the principal and sureties therein, for any and all breaches of the condition or conditions thereof, committed during the time such officer shall continue to discharge any of the duties of, or hold such office; and for the faithful discharge of all duties which may be required of such officer by any law enacted subsequently to the execution of such bond, and such condition shall be expressed therein; to and for the state of California, and to and for the use and benefit of all persons who may be injured or aggrieved by the wrongful act or default of such officer in his official capa-

<sup>1</sup> Wood's Dig. art. 236.

<sup>2</sup> Id. 206-214.

<sup>3</sup> Id. 235.

city; and any person, so injured or aggrieved, may bring suit on such bond, in his own name, without an assignment thereof.<sup>1</sup>

Any such bond shall not be void on the first recovery of a judgment thereon; but suit or suits may be afterward brought on said bonds, from time to time, and judgment recovered thereon by the state of California, or by any person to whom a right of action may have accrued against such officer and his sureties on said bond, until the whole penalty of such bond shall be exhausted.<sup>2</sup>

Whenever any such official bond shall not contain the substantial matter, or condition or conditions required by law, or there shall be any defects in the approval or filing thereof, such bond shall not be void so as to discharge such officer and his sureties, but they shall be equitably bound to the state or party interested; and suit may be brought, the defect being suggested and the parties held responsible.<sup>3</sup>

All bonds or undertakings given by trustees, receivers, assignees, or officers of a court, in an action or proceeding, for the faithful discharge of their duties, where it is not otherwise provided by law, shall be in the name of, and payable to, the people of the state of California; and upon the order of the court where such action or proceeding is pending, may be prosecuted for the benefit of any and all persons interested therein.<sup>4</sup>

New or additional bonds may be required, whenever sureties become insolvent or remove from the state, or from other cause such further bond becomes necessary, also when the sureties wish to be discharged, and a failure to file such new or additional bond when legally required, vacates the office.

The discharge of any surety, releases him only as to liability to be incurred after the discharge.<sup>5</sup>

All public officers are prohibited from dealing directly or indirectly in scrip-warrants, and all other evidences of indebtedness (except the same be funded) against the state, or any county, city or town, unless it be such warrants, scrip, &c., as they may have received for their services. This prohibition however applies to state officers, only as to state indebtedness; and to county and city officers, only as to the indebtedness of the respective counties

<sup>1</sup> Wood's Dig. art. 206-214.

<sup>2</sup> id. 215.

<sup>3</sup> id. 236.

<sup>4</sup> id. 218-222.

or cities they represent. The offence is made a misdemeanor, punishable by fine and imprisonment, forfeiture of office, and disqualification for any other office.<sup>1</sup>

Provision is also made for the punishment of officers for extortion, or for refusing or neglecting to perform any lawful official act.<sup>2</sup>

The statute also forbids officers from being directly or indirectly interested in any public purchase, or any public contracts made by the corporation or body of which he is a member, or in any purchase made in the department under which he is appointed to serve.<sup>3</sup>

#### FORMS.

##### *Official Oath.*

I do solemnly swear [*or affirm*], that I will support the constitution of the United States, and the constitution of the state of California, and that I will faithfully discharge the duties of [*give the title of the office*] according to the best of my ability.

A. B.

Sworn and subscribed, this first day of January, 1859, before me,

M. C. BLAKE,

County Judge of the City and County of San Francisco.

##### *General Form of an Official Bond.*

Know all men by these presents, that we, A. B., as principal, and C. D., and E. F., of, &c. as sureties, are held and firmly bound unto the state of California [*or, the officer, or officers, to whom the bond is to be given*], in the penal sum of \_\_\_\_\_ dollars, for which payment, well and truly to be made, we bind ourselves, our and each of our heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals, and dated the \_\_\_\_\_ day of \_\_\_\_\_ A. D. 1859.

Whereas, the above bounden A. B. has been appointed [*or, elected*] to the office of [*give the title of the office*]: Now, therefore, the condition of the above obligation is such, that if the said A. B. shall well and truly, and faithfully perform and execute the duties of [*title of the office, or, his trust*], according to law, and according to the requirements of any law to be here-

<sup>1</sup> Wood's Dig. art. 2885-2889.

<sup>2</sup> Id. 2894, 2895.

<sup>3</sup> Id. 2890, 2891.

after enacted, then the above obligation to be void ; else to remain in full force.

Signed and sealed in }  
presence of G. H. }

A. B. [L. s.]  
C. D. [L. s.]  
E. F. [L. s.]

*Official Bond for County of San Francisco.*

Whereas, A. B., at the general election held on the first day of September, 1858, was elected to the office of public administrator, in and for the city and county of San Francisco, state of California, and whereas the said A. B. is required by law to file an official bond previous to entering upon the duties of said office, and whereas the amount of such bond has been fixed at fifty thousand dollars.

Now, therefore, know all men by these presents, that we, A. B., of the city and county of San Francisco, as principal, and C. D. and E. F., residents and freeholders of the said city and county, as sureties, are jointly and severally bound and indebted unto the state of California, in the sum of thirty thousand dollars, a portion of the said sum of fifty thousand dollars.

And we, the said A. B., of the said city and county, as principal, and G. H. and J. K., residents and householders of the said city and county, as sureties, are jointly and severally held, and bound, and indebted unto the state of California in the sum of ten thousand dollars, a portion of the said sum of fifty thousand dollars.

And we, the said A. B., of the said city and county, as principal, and L. M., resident and freeholder, and N. O., resident and householder of the said city and county, as sureties, are jointly and severally held, and bound, and indebted unto the state of California, in the sum of five thousand dollars, a portion of the said sum of fifty thousand dollars.

And we, the said A. B., of the said city and county, as principal, and P. Q., resident and householder, and R. S., resident and freeholder of the said city and county, as sureties, are jointly and severally held, and bound, and indebted unto the state of California, in the sum of five thousand dollars, a portion of the said sum of fifty thousand dollars, lawful money of the United States of America, for the payment of which several sums of money well and truly to be made, the parties jointly and severally indebted herein as aforesaid, jointly and severally bind themselves, their heirs, executors and administrators, firmly by these presents, sealed with our seals, and dated this fifteenth day of September, in the year of our Lord one thousand eight hundred and fifty-nine.

The condition of this obligation is such, that if the above

bounden A. B. shall well, truly and faithfully perform and execute the duties of public administrator of the city and county of San Francisco, as required by law, as well those which may be required of him by any law now existing, as those which may be required by any law enacted subsequently to the execution of this bond, then this obligation to be void, otherwise to be and remain in full force and effect.

Signed and sealed in presence of E. W. BURR.

A. B. [L. s.]	L. M. [L. s.]
C. D. [L. s.]	N. O. [L. s.]
E. F. [L. s.]	P. Q. [L. s.]
G. H. [L. s.]	R. S. [L. s.]
I. K. [L. s.]	

*Affidavit of Justification upon the foregoing Bond.*

State of California, }  
City and County of San Francisco. }

C. D., E. F., G. H., J. K., L. M., N. O., P. Q., and R. S., being duly sworn, each for himself, doth depose and say, that he is a resident and freeholder or householder in the said city and county of San Francisco, and that he is worth the amount for which he becomes liable as surety on the foregoing bond, over and above all his debts and liabilities, in unincumbered property situated within this state, which may be levied upon, and is not exempt from execution and forced sale, and above all sums for which he is already liable, or in any manner bound, whether as principal, or endorser, or surety, or whether such prior obligation or liability be conditional or absolute, liquidated or unliquidated, certain or contingent, due or to become due, in fixed property, including mortgages, situate in said city and county, and that he is not a banker doing business in said city and county, nor any such banker's partner, clerk, employee, agent, attorney, father, son or brother.

Subscribed and sworn to, before me, }  
this fifteenth day of September, 1859,  
by C. D., E. F., G. H. and P. Q.

M. C. BLAKE, County Judge.

Subscribed and sworn to before me, }  
this sixteenth day of September, 1859,  
by I. K., L. M., N. O. and R. S.

WILLIAM DUER, County Clerk. }

A. B.  
C. D.  
E. F.  
G. H.  
I. K.  
L. M.  
N. O.  
P. Q.  
R. S.

*Endorsements upon the same Bond.—Official Bond.*

A. B., Public Administrator.

City and County of San Francisco.

Penalty, \$50,000.

Dated, September 15th, 1859.

Approved this 16th day of September, 1859.

E. W. BURE, Pres. Board Supervisors.

ETTING MICKLE, City and County Auditor.

M. C. BLAKE, County Judge.

Filed this 16th day of September, 1859.

ETTING MICKLE, City and County Auditor.

*Commission.*

The People of the State of California to all to whom these presents shall come, greeting :

Know ye, that whereas Thomas W. Freelon, on the seventh day of September, in the year of our Lord eighteen hundred and fifty-three, was duly elected judge of the county of San Francisco, for the full term, as appears from the returns of election on file in the office of the secretary of state ;

Now, therefore, I, John Bigler, governor of the state of California, do by these presents commission the said Thomas W. Freelon as judge of said county as aforesaid, to enter upon the duties of the office on the first Monday of April A. D. 1854, to have and to hold said office, with all the powers, privileges and emoluments to the same of right appertaining, unto him the said Thomas W. Freelon, for the term prescribed by law.

In testimony whereof, I have caused the great seal of the state of California to be hereunto affixed.

Given under my hand at Benicia the twenty-sixth day of September in the year of our Lord eighteen hundred and fifty-three.

JOHN BIGLER.

[L. s.]

Attest : J. W. DENVER, Secretary of State.

*Certificate of Election.*

United States of America, }  
 State of California, }  
 City and County of San Francisco. }

{ Office of the County Clerk of the City  
 and County of San Francisco.

I, William Duer, county clerk of said city and county, do hereby certify, that at an election held in said city and county of San Francisco, on Wednesday, the first day of September, Anno Domini one thousand eight hundred and fifty-eight, was elected.

Witness my hand and the seal of the county court of the city  
and county of San Francisco, this            day of            , A. D.  
185            County Clerk.

State of California, }  
City and County of San Francisco. }

I,            do solemnly swear that I will support the constitu-  
tion of the United States of America, and the constitution of the  
state of California: and that I will faithfully discharge the duties  
of            to the best of my ability. So help me God.

Subscribed and sworn to before me, this            day of            ,  
A. D. 1858.



## CHAPTER XXXV.

## SCHOOLS.

UNDER the constitution of California, the subject of education is treated with great liberality and importance, and provision is made for the encouragement of a state university, and a system of common schools.

A general outline of the system of school education adopted by our statutes, is all that can be given within the limits of the present work.

By the law of 1855, passed for the establishment and regulation of common schools, the whole state is divided into districts, called school districts; it being provided that each town or township shall constitute one district, until otherwise determined and established by the proper authorities; that the board of supervisors of a county may, upon petition, establish and regulate the boundaries of districts in their own county; and that incorporated cities and towns may, within their respective limits, establish their own districts.<sup>1</sup>

For the regulation of each district, a board of three trustees is annually elected; except where, in cities, a board of education is established. To the trustees are assigned the duties of locating and erecting school-houses, of examining and appointing teachers; of fixing the salaries of teachers, of suspending or expelling pupils, of visiting the schools, of appointing a common school marshal, and of making the division of primary, grammar and high schools.<sup>2</sup>

They are also required to observe the instructions of the state board of education, and of the superintendent of public instruction; to distribute blank forms, laws and instructions; to keep open records of their acts and decisions, and money accounts; and to report annually in relation to their expenditures, the

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<sup>1</sup> Wood's Dig. art. 2213-2215.

<sup>2</sup> Id. 2210-2217.

teachers, the moneys received, the number, attendance and progress of pupils, and such other statistics as may be directed.

They may also, under certain circumstances, call an election, and submit to the qualified voters of the district, whether they shall be taxed for an additional term of school, and may also call an election upon the question of a tax for building a school-house.<sup>1</sup>

The county superintendent has a supervision over the interests of the schools in his county; and it is his duty to visit, personally, each school, at least once a year; to give aid and counsel to the trustees, marshals and teachers; to aid the trustees in their examination of teachers; to distribute promptly the blank reports, forms, laws and instructions; to file the reports of the trustees, marshals and teachers; to keep a record of his acts, and to report annually to the superintendent of public instruction.<sup>2</sup> Such report should include abstracts of the annual reports of trustees, marshals and teachers, required by the act of 1858 to be made.<sup>4</sup>

He is also required to make the apportionment of the common school moneys in the county treasury, among the several school districts, in proportion to the number of white children residing therein between the ages of four and eighteen years; and to draw warrants on the county treasurer for the payment of such moneys.<sup>3</sup>

The state board of education is composed of the governor, the superintendent of public instruction, and the surveyor-general of the state.

The superintendent of public instruction has the general supervision and management of the school interests of the state. His duties, in the words of the statute, are as follows:

It shall be the duty of the superintendent of public instruction, by and with the advice, and subject to the supervision of the state board of education: 1. To prepare and publish, in connection with this act, instructions and forms for the direction of the superintendents, boards, trustees, marshals, and teachers of the common schools, and to distribute to each county superintendent a sufficient number of copies of this act, and of the said instruc-

<sup>1</sup> Wood's Dig. art. 3210.

<sup>2</sup> Laws 1858, p. 884, 885.

<sup>3</sup> Wood's Dig. art. 3306

<sup>4</sup> Laws 1858, p. 884.

<sup>5</sup> Wood's Dig. art. 3306, § 11, 3307, 3308, 3317; Laws 1858, p. 884.

tions and forms, for the supply of the common school officers in the county. 2. By all proper means in his power to disseminate intelligence among the people in relation to the method and value of education. 3. To exercise a general supervision over such normal schools and teachers' institutes as may by law be established. 4. Immediately after the state controller has made his semi-annual report, as herein required, to apportion to the several counties the amount of school moneys in the state treasury, to which each shall be entitled under the provisions of this act, in proportion to the number of children residing therein, between the ages of four and eighteen, as shown by the last previous reports of the county superintendents and school marshals, or other officers charged therewith, and make a record thereof in the book of records, to be kept by the state board of education, and furnish to the controller of state, to each county treasurer, and to each county superintendent, an abstract of such apportionment; and with each apportionment, to furnish to each county treasurer his order on the controller of state, under the seal of the state board of education, for the amount of school moneys in the state treasury to which such county shall be entitled, and to take such county treasurer's receipt for the same. 5. To present to the legislature annually, on or before the tenth day of each session, a full report of the condition of public instruction in the state; the number and grade of schools in each county; the number of white children in each county, between the ages of four and eighteen years; the number of such attending common schools established under the provisions of this act: the amount of common school moneys apportioned to each county; the amount of moneys raised and expended by any county, town, city, or school district for the support of common schools therein; together with such suggestions as he may deem it expedient to make in relation to the construction of school-houses, the improvement and better management of common schools, the qualification of teachers, the ways and means for raising funds for the support of common schools, and providing suitable school-houses, and for the promotion of the general interests of education throughout the state.<sup>1</sup>

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<sup>1</sup> Wood's Dig. art. 8201.

No special provision of the statute determines who are entitled to attend the schools as pupils, but they are considered as open to all children, subject to proper regulations; except that the provision of the statute requiring the census reports to return the number of *white* children to determine the apportionment of school moneys is construed as excluding *colored* children. The rules of the board of education of the city of San Francisco provide, that no pupil shall be received under the age of five years.

When the public appropriation for the payment of teachers falls short, the deficiency is made up by a rate bill, made out by the trustees against those sending to school; excepting however, such indigent inhabitants, as may in their judgment be entitled to such exemption.<sup>1</sup>

The duty of the common school marshal is, to take an annual census of all the white children within his precinct, between the ages of four and eighteen years, and report to the county superintendent, that he may apportion the school moneys received into the county treasury, among the several school districts, towns and cities in the county.<sup>2</sup>

In addition to the officers already mentioned, the statute provides for the establishment of a board of education and a superintendent of common schools, for cities and towns as follows:

The common council of each and every incorporated city in this state, shall be, and hereby is, authorized and empowered: 1. To raise annually by tax upon the real estate and personal property within the city, as estimated by the city assessors, such amount of money not exceeding one-fourth of one per cent. on the valuation on the assessment roll, as shall be requisite for the support of free common schools therein, and providing and furnishing suitable houses therefor, and purchasing lots on which to build school-houses, and paying contingent expenses. 2. To provide, by ordinance, for the collection, custody and disbursement of the moneys thus raised by city tax for school purposes. 3. To provide, by ordinance, for the drawing from the county treasury on the warrant of the county superintendent of common schools, the moneys to which said city shall be entitled under the provisions of this act, and for the custody and disbursement by

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<sup>1</sup> Wood's Dig. art. 3313.

<sup>2</sup> Id. 3313, 3307.

the city treasurer of the same, in accordance with the provisions of this act. 4. To provide, by ordinance, for constituting and establishing school districts, and for the examination of common school teachers; the regulation of common schools within the city; the census, or enumeration of the children, and for making the annual and other reports to the county superintendent. 5. To provide, by ordinance, for the election or appointment of a city board of education and superintendent of common schools, and prescribe their powers and duties; and, 6. To ordain all such rules and regulations as they may deem expedient and necessary for the promotion of the interests, prosperity and usefulness of common schools within the city: *provided*, that the common council shall not make any ordinance, nor do any act which shall be in conflict with the principle or provisions of the constitution of the state or of any act of the legislature. 7. *Provided*, that the common council, on the petition of fifty heads of white families, citizens of the district, shall establish a school or schools in said district, and shall award said school or schools, a *pro rata* of the school fund; *provided*, no sectarian doctrines are taught in said school or schools, and said schools so established, shall in all particulars be under the supervision and control of the common council, as are all other common schools within their jurisdiction, under the provisions of this act.<sup>1</sup>

No trustees or marshals elected or appointed under the foregoing provisions of this act, shall have any jurisdiction or control within the limits of any city which shall have provided for the support, regulation and management of common schools therein under the provisions of the next preceding section of this act.<sup>1</sup>

The state school fund is derived, partly from the interest collected from the state, on certain bonds of the civil funded debt of the state, purchased with the proceeds of the sales of the lands granted to the state by Congress, and with the proceeds of escheated estates, and deposited with the state treasurer to the credit of the "school fund;" and partly from the proceeds of unclaimed property descended to aliens; which moneys are distributed to the various counties, in proportion to the juvenile

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<sup>1</sup> Wood's Dig. art. 8314, 8315.

population ; to be applied solely to the payment of teachers, duly qualified under the statute.<sup>1</sup>

The county fund is raised by tax, and by contribution levied upon those able to pay ; to which are added portions of the poll-tax, certain penalties for the violation of the game laws, and for allowing hogs to trespass upon property ; and by sales of certain school lands. Cities and towns, and districts may also be authorized to levy a school-tax.\*

SEC. 32. No common school shall receive any moneys, benefits or immunities, under the provisions of this act, unless such school shall be instructed by a teacher or teachers duly examined, approved and employed by competent and legal authority, as hereinbefore provided.

SEC. 33. No books, tracts or papers of a sectarian or denominational character, shall be used or introduced in any school established under the provisions of this act ; nor shall sectarian or denominational doctrines be taught therein ; nor shall any school whatever receive any of the public school funds, which has not been taught in accordance with the principles of this act.

SEC. 34. No teacher shall be entitled to any portion of the public common-school moneys as compensation or salary for services rendered, unless such teacher shall have been duly employed by competent authority, nor unless such teacher shall have had, during the whole time of such service, such certificate of competency and approval as required by this act in full force and effect, and bearing date within one year next before the services aforesaid shall have been rendered ; nor unless such teacher shall have made report in manner and in form as shall be prescribed by the superintendent of public instruction.

SEC. 35. The common school year shall commence on the first day of November, and shall end on the last day of October.

SEC. 36. Any printing required under this act, shall be executed in the form and manner and at the prices of other state printing, and shall be paid for in like manner out of the general fund, upon the bill for the same being certified by the state board of education.<sup>2</sup>

<sup>1</sup> Wood's Dig. art. 2865, 2866, 2711, 2216 ; Laws 1858, p. 250.

<sup>2</sup> Wood's Dig. art. 2539, 2577, 2214-2218 ; Laws 1858, p. 818, 828 ; Laws 1857, p. 842.

<sup>3</sup> Wood's Dig. art. 2219.

The very excellent work of the present superintendent of public instruction, entitled "Commentaries upon the School Law," embraces a full exposition of the subject of our common schools, and issues for uniform use in the state, the forms which conclude this chapter.

#### OREGON AND WASHINGTON.

The school systems for Oregon and Washington are alike—the statute of the territory of Washington upon the subject being almost a literal copy of that of Oregon.

Their system, in its general features, resembles very much that of California, excepting in the absence of any provision for the state board of education, and a superintendent of public instruction. There are some other differences. The county superintendent makes the division of his county into districts. Instead of trustees, they have directors. Each district has a clerk, who performs, among other duties, the service of our marshal, of taking the school census.

The following provisions of the statute determines who are entitled to attend the schools.

Whenever a school is kept in any district, the teacher of which shall be supported out of the general county school fund, or by tax on the district as aforesaid, such school shall be open and free to all children between the ages of four and twenty-one years, in such district. The directors may permit scholars living out of the district to attend school, with or without charge, as they may deem proper.

#### FORMS.

The following forms have been drawn to assist the school officers in carrying out the provisions of the law, and to secure uniformity:

##### *Appointment of District School Trustees.*

In accordance with section 15 of an act in relation to common schools, passed May 3, 1855, you are hereby appointed a trustee

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<sup>1</sup> Statutes O. 466; Statutes W. T. 828.

of common schools for                      district of                      township, of  
the county of                      .

You will qualify according to law, and then enter upon the  
discharge of your duties.                      A. B.,

To                      Superintendent of Common Schools  
for                      county.

OATH OF OFFICE.

I do solemnly swear [*or, affirm*] that I will support the consti-  
tution of the United States, and the constitution of the state of  
California, and that I will faithfully discharge the duties of com-  
mon school trustee, for the                      school district of  
township, in the county of                      , and state of California,  
according to the best of my ability.

Sworn and subscribed to before me, a                      of the county  
of                      , and state of California, this                      day of                      ,  
Anno Domini 185                      .

NOTE.—This oath may be taken before any officer in the state,  
authorized by law to administer oaths.

*Certificate of Election of a Trustee of Common Schools.*

To                      , of                      , greeting:

This certifies that you, the said                      , were, at an election  
held on the                      day of April, Anno Domini 185                      , chosen  
to the office of trustee of common schools of [*the district, town  
or city, as the case may be,*] and you are, by virtue of said election  
and qualification, fully authorized and empowered to discharge  
all the duties of said office, and to exercise all the powers thereto  
belonging, according to law, for one year from and including the  
second Monday of April, 185                      .

A. B., County Clerk.

NOTE.—The oath of office must be taken in form as appended  
to No. 1, and should be attached to the certificate, and both filed  
immediately in the office of the county superintendent.

*Appointment of a Common School Marshal.*

We, the undersigned, trustees of common schools for district  
                    , in the county of                      , appoint                      a common  
school marshal, to take the census of the children between the  
ages of four and eighteen years, and, separately, the census of  
children under four years of age, in said district.

A. B.,  
C. D.,  
E. F.,

[*Date.*]

Trustees of Common Schools.



*Certificate of Qualification to Keep a School.*

We, the undersigned, trustees of common schools, hereby certify that, after due examination, we are satisfied that is of good moral character, and possesses sufficient learning and ability to teach, and impart knowledge, and govern a school; we therefore grant to this our certificate, which shall remain in force during one year from date, unless sooner revoked.

A. B.,  
C. D.,  
E. F.,

[Date.]

Trustees of Common Schools.

NOTE.—Wherever desirable, the aid of others can be called in to make a thorough examination of the teacher. Let the teacher name his conduct of a school from the opening to the close, after you have tested his literary acquirements.

*Form of a Receipt of the County Superintendent of Common Schools.*

Received of , county superintendent of common schools, all documents, books and papers belonging to his office as such superintendent. A. B.,

[Date.]

County Superintendent Common Schools.

NOTE.—The law requires this receipt to be filed in the office of the county treasurer.

*Form of Receipt of the Trustees of Common Schools, under section 16, clause 11.*

Received of , trustees of common schools for the books of record, and all papers, books, blanks and documents, remaining in their hands as such trustees. A. B.,

C. D.,

[Date.]

Trustees Common Schools.

*Form of County Superintendent's Warrant upon the County Treasurer.*

No.

185

The treasurer of the county of , will pay from the school fund, to , or order, dollars, on account of . A. B.

\$

County Superintendent Common Schools.

*Form of Annuling a Certificate.*

Whereas, the trustees of common schools for the \_\_\_\_\_ of \_\_\_\_\_, did, on the \_\_\_\_\_ day of \_\_\_\_\_ Anno Domini, 185 \_\_\_\_\_, issue to \_\_\_\_\_ a certificate of qualification as a teacher in said \_\_\_\_\_ ;

Now, know ye, that upon further investigation and trial, the said \_\_\_\_\_ has been found deficient and unqualified [or, has refused to conform to the regulations made by law.] We do therefore declare the said certificate to be annulled and void from this date, of which all persons whose duty it is to employ teachers of common schools, are hereby requested to take notice.

A. B.,

C. D.,

E. F.,

Trustees of Common Schools.

To the Superintendent of Common Schools for the county of \_\_\_\_\_, 185 \_\_\_\_\_.

NOTE.—It will be proper that notice of the annulling should be given to the county and state superintendents.

*Form of Poster, giving notice of a District Election for Additional Taxation to Maintain Schools.*

To the electors of \_\_\_\_\_ school district:

Notice is hereby given, that an election will be held on the \_\_\_\_\_ day of \_\_\_\_\_, at which will be submitted the question, whether you will authorize a tax to pay the expense of maintaining \_\_\_\_\_ school for an additional term of \_\_\_\_\_ months.

It will be necessary to raise, for this purpose, the sum of \$ \_\_\_\_\_ and the rate of taxation necessary to be levied, will be \_\_\_\_\_ cents upon the one hundred dollars of valuation of taxable property in the district.

The polls will be opened at \_\_\_\_\_, between the hours of \_\_\_\_\_ and \_\_\_\_\_. A full attendance is requested.

A. B.

C. D.

E. F.

A. D. 185 \_\_\_\_\_.

District School Trustees.

NOTE.—The date must be twenty days prior to the time fixed for the election. The posters should be put up in a dozen conspicuous places in the district.

*Form of Poster, giving Notice of a District Election for Additional Taxation, to Build School-House.*

To the electors of                      school district :

Notice is hereby given, that an election will be held on the day of                      , at which will be submitted the question, whether you will authorize a tax for the purpose of building a school-house in this district.

It will be necessary to raise, for this purpose, the sum of \$                      and the rate of taxation necessary to be levied will be                      cents on the one hundred dollars of valuation of taxable property in the district. The plans and specifications of the proposed building may be seen at                      .

The polls will be opened at                      , between the hours of                      and                      .

A full attendance is requested.

A. B.,

C. D.,

E. F.,

, 185 .

District School Trustees.

NOTE.—The date, as before, must be twenty days prior to the election, and the posters should be put up in a dozen or more conspicuous places.

*Form of Appointment of Collector of Tax.*

To all whom it may concern :

The electors of                      school district having, at an election held on the                      day of                      , A. D. 185                      , authorized the levying of a tax, amounting to                      cents on the one hundred dollars of valuation of taxable property in the district, for the purpose of maintaining                      school for an additional term of                      months [or, building a school-house, as the case may be], the trustees of the district hereby appoint                      to collect said tax, with all the powers to enforce the collection which are given to sheriffs and tax collectors in the collection of state and county taxes.

A. B.

C. D.

E. F.

[Date.]

Trustees of

District.

*Census Returns.*

Report of the Common School Marshal to the County Superintendent, School Trustees and State Superintendent, for school year ending October 31, 185 .

Name of District and of School Boundary.	Name of Parent or Guardian residing therein.	Number of Children (4 to 18 years) of the name of the Parent.	Number and names of Orphans.	Total Boys.	Total Girls.	Total number of Children, between 4 and 18 years, in District.	Number of Children under 4 years.	Total Children of all ages born in California.	Number of Deaf and Dumb persons in District.

*Form of Affidavit to be appended to the Census Returns.*

County of                   , } ss :

On this                   day of                   , A. D. 185                   , personally appeared before me, the undersigned, a justice of the peace for the county and                   aforesaid,                   a duly appointed common school marshal, whose signature is hereunto subscribed, and being sworn according to law, made oath that the facts set forth in the above report are just and true, according to the best of his knowledge and belief.

A. B., Justice of the Peace.

(Signed)

Common School Marshal for                   .

NOTE.—This report must be made out in triplicate; one for trustees, one sent to the county superintendent, and the third to the superintendent of public instruction.

*District School Trustees' Report.*

Report of the Trustees of Common School of \_\_\_\_\_ District, to  
 the County Superintendent for the District of \_\_\_\_\_ and  
 County of \_\_\_\_\_, from \_\_\_\_\_, 185 \_\_\_\_\_, to \_\_\_\_\_ 185 \_\_\_\_\_.

Names of Districts.	Name or No. of School from which reports have been received from the Teacher.
Number of Orphans.	Total number of children between the ages four and sixteen, entitled by law to attend the School within the School Boundary.
Number of Boys in District.	Number of Girls in District.
Number of Children, under four years, in District.	Total Children of all ages born in California.
Number of Deaf and Dumb.	Number of Pupils attending School.
Daily average attendance.	Grade of School.
Names of Teachers employed.	Time during which School was maintained.
Salaries per month paid each Teacher.	Amount raised in the School Boundary and paid Teachers.
Total amount of salaries paid Teachers.	Amount expended for School Libraries and Apparatus.
Amount expended in erection, rents, or repairs of School Houses, and furnishing same.	Total amount of expenditures for School purposes in the District.
Titles of Books used in District.	Remarks suggested by Teachers' reports, and general remarks by the Trustees.

NOTE.—When the above blank is filled up, which must be done on or before November 1st, of each year, the following certificate should be appended :

We, the undersigned, trustees of common schools for the district of \_\_\_\_\_ and county aforesaid, certify that the above is a true statement of the condition of the common schools of said district.

A. B.,  
 C. D.,

Trustees of Common Schools.

To \_\_\_\_\_, County Superintendent of Common Schools :

NOTE.—A duplicate of this report must be forwarded, without fail, to the state superintendent, at San Francisco. The trustees will accompany their report as above, with such remarks as they may think the interest of the public school system in their town or city may require.

*County Treasurer's Report.*

Report of the County Treasurer to the Superintendent of Public  
Instruction for the County of \_\_\_\_\_, from \_\_\_\_\_, 185\_\_\_\_,  
to \_\_\_\_\_, 185\_\_\_\_.

Name of Town, City, or District.	
Name or No. of School.	
Amount of State Funds received.	
Amount of State Funds expended.	
Amount of State Funds on hand.	
Amount of County Tax collected for School purposes.	
Amount paid for Teachers' Salaries.	
Amount paid for erection, rents and repairs of School Houses.	
Amount paid for School Libraries and Apparatus.	
Total amount of School Moneys from all sources.	
Total amount of School Moneys on hand.	

NOTE.—It is absolutely necessary that county treasurers fill up each and every column in the above report, to enable the state superintendent to present an intelligible report of the financial condition of the schools to the legislature. If no money has been paid for any purpose mentioned—for libraries and apparatus, for instance—report specially, in the appropriate column, “None.”

*County Superintendent's Report.*

Report of the County Superintendent of Public Schools, to the  
State Superintendent of Public Instruction, for the County  
of \_\_\_\_\_, from \_\_\_\_\_, 185\_\_\_\_, to \_\_\_\_\_, 185\_\_\_\_.

	NAMES OF DISTRICTS OR CITIES.
	Name or Number of School.
	Number of Children between 4 and 18 years.
	Number of Boys in District.
	Number of Girls in District.
	Number of Children, under 4 years, in District.
	Total Children of all ages born in California.
	Number of Deaf and Dumb.
	Number of Pupils attending School.
	Daily average attendance.
	Names of Teachers employed.
	Salaries per month paid to each Teacher.
	Time during which School was maintained.
	Amount of State School Money drawn to pay Salaries.
	Amount raised in the School Boundary, and paid Teachers, per Report of Trustees.
	Total amount of all Drafts on account of Salaries.
	Amount expended in the erection, rents, or repairs of School Houses.
	Amount expended for School Libraries and Apparatus.
	Total amount of expenditure for School purposes in the District.
	Grade of School.
	Amount of County Tax received for School purposes.
	Valuation of Taxable Property in County.
	Names of the Trustees of Common Schools, and Remarks.

NOTE.—It is indispensable that the county superintendent fill every column in the above report, and transmit it to the superintendent of public instruction, on or before the 20th of November.

In addition to the above, the county superintendent will be furnished with a note-book, containing appropriate heads, designed to collect various items of valuable information connected with the school department.

This note-book he will fill up, and consider an appendix to his report, to be transmitted at the same time, to the state superintendent.

N. B.—The county superintendent should keep a copy of his report, when filled, in order that he may have the requisite data upon which to distribute the state and county school fund.





## CHAPTER XXXVI.

## SHERIFF.

THE sheriff is a conservator of the peace in his county. It is his duty within his county: 1. To arrest and take before the nearest magistrate for examination, all persons who commit, or attempt to commit, a public offence in his presence, or who have committed a public offence. 2. To prevent and suppress all affrays, breaches of the peace, riots and insurrections, which may come to his knowledge. 3. To execute the process, writs, warrants and order of the courts of justice, or of judicial officers, when delivered to him for that purpose. 4. To attend in person, or by deputy, all courts except justices', probate and recorders' courts, at their respective terms, held within his county, and to obey their lawful orders and directions. 5. To serve at the request of a party to an action or proceeding, notices and papers therein. 6. In the execution of these duties, to command the aid of as many male inhabitants of his county as he may think proper and necessary.<sup>1</sup>

He is the keeper of the county jail, and is responsible for the management thereof, and the safe-keeping of the prisoners.<sup>2</sup>

He is required to appoint an under-sheriff, to perform the duties of his office, in case the sheriff is absent from the county, or from sickness or other cause, is unable to perform them himself. He may also appoint as many deputies as he thinks proper. In San Francisco the number is limited.<sup>3</sup>

He is required to keep an office at the county seat, open on all days except Sundays, from nine to twelve in the forenoon, and from two to five in the afternoon. In San Francisco the hours are from nine to five in the summer months, and from ten to four in the winter months.<sup>4</sup>

The sheriff or his deputy is required to attend the sessions of court, to act as the crier thereof, to call the parties and witnesses

<sup>1</sup> Wood's Dig. art. 8326.

<sup>2</sup> id. 3345-3360.

<sup>3</sup> id. 3243, 3244; Laws 1859, p. 90.

<sup>4</sup> Wood's Dig. art. 8341; Laws 1854, p. 148.

and all other persons bound to appear at the court, and make proclamation of the opening and adjournment of the court and of any other matter under its direction, also to serve the processes and execute the orders of the court, as lawfully directed.

Except in certain counties, the sheriff is by statute constituted the tax-collector.

A sheriff or other ministerial officer shall be justified in the execution of all process and orders regular on their face, and issued by competent authority, whatever may be the defect in the proceedings upon which they were issued.<sup>1</sup>

No direction or authority by a party or his attorney to a sheriff, or to an under or deputy sheriff, in respect to the execution of process or return thereof, or to any act or omission relating thereto, shall be available to discharge or excuse the sheriff from a liability for neglect or misconduct, unless it be contained in a writing signed by the party to be charged or affected thereby, or his attorney.<sup>2</sup>

When the office of the sheriff is vacant, or when the sheriff is a party to the action or proceeding, the coroner shall act in his place—when the sheriff and coroner are both parties, or the action is against either of these parties for disobedience of orders, the powers or orders in the action may be executed by a person designated by a judge, denominated an elisor.<sup>3</sup>

Notwithstanding the election and qualification of a new sheriff, the former sheriff is required to return all process and orders before and after judgment, which he has fully executed, and to complete the execution of all final process which he has begun to execute, and the collection of all taxes put into the hands of the sheriff for collection previous to the expiration of his term of office.<sup>4</sup>

#### FORMS.

##### *Form of Sheriff's Return as to Garnishments.*

On the 1st day of January, 1858, I served on, and delivered to John Mack, a copy of the within execution with a notice in

<sup>1</sup> Wood's Dig. art. 3365.

<sup>2</sup> id. 3362.

<sup>3</sup> id. 3271-3274; for San Francisco, see Laws 1856, p. 148; Laws 1859, p. 8.

<sup>4</sup> Wood's Dig. art. 3353.

writing hereto annexed, signed by me, whereof the following is a true copy :

To John Mack: You are hereby notified, that by virtue of a writ of execution issued out of the District Court of the twelfth judicial district in and for the county of San Mateo, in favor of Henry Haws *vs.* William Jones, to me directed and delivered, of which the foregoing is a true copy, I have levied upon, seized and attached in execution, all debts by you owing to the said William Jones, and the rights, credits and other personal property in your possession or under your control, belonging to the said William Jones, defendant in execution.

JOHN W. ACKERSON,  
Sheriff of San Mateo County.

On the                      day of                      1858, I made the same service in all respects on David McClelland, &c., &c.

And so I did levy on, seize, and attach in execution, all debts owing to the defendant, William Jones, by John Mack, David McClelland, &c., &c., and all the rights, credits, and personal property in possession or under your control, belonging to the said defendant, William Jones, the defendant in the within execution.

Redwood City, Feb. 1, 1859.

JOHN W. ACKERSON,  
Sheriff of San Mateo County.

*Release of Property from Attachments.*

District Court,	District, }
County of	
A. B. }	
against }	
C. D. }	

Know all men by these presents, that we,                      , the above-named plaintiffs, for and in consideration of                      , to us in hand paid by                      , the receipt whereof is hereby acknowledged, hereby release and discharge from the lien or liens of any attachment or attachments heretofore issued and levied in the above-entitled action, the following-described premises, situated in the city of San Francisco, namely, all that &c., &c., so that the said property shall stand free and clear of the lien or all or any of aforesaid attachments, and be as if the same or any of the same had never issued; but it is distinctly understood, that this release and discharge is only as to the property herein particularly described, and is in no way to affect, release or discharge property embraced in said attachment, or any of them, other than that herein set forth—and further, is in no way to affect or discharge plaintiff's cause of action in aforesaid suit.

Dated, &c.

[Signed by the Attorneys.]

*Sheriff's Bail Bond.*

State of California, }  
 County of Santa Clara. }

Whereas, in a certain action in the District Court of the third judicial district in and for the county of Santa Clara, in which Peter Smith is plaintiff, and Brigham Young is defendant, an order was duly made and delivered to the sheriff of the county of Santa Clara, requiring him forthwith to arrest the said defendant and hold him to bail, in the sum of ten thousand dollars; and the said sheriff having arrested the said defendant and taken him into custody by virtue of the said order.

Now, therefore, we, Henry Flint, residing at San José, in the county of Santa Clara, by occupation a gunsmith, and Charles Steele, residing at Milpitas, in the said county, by occupation a farmer, are jointly and severally bound in the sum of ten thousand dollars, the amount in the said order of arrest mentioned, that the said defendant shall at all times render himself amenable to the process of the said court during the pendency of the said action, and to such as may be issued to enforce the judgment therein; or that we will pay to the said plaintiff the amount of any judgment which may be recovered in the said action.

Dated the tenth day of November, 1859.

HENRY FLINT.

Witness, L. P. PECK.

CHAS. STEELE.

*Bond of Indemnity to Sheriff.*

Know all men by these presents, that we, Peter Hart, as principal, and John Bond and William Doad as sureties, are held and firmly bound unto John M. Murphy, sheriff of the county of Santa Clara, in the sum of one thousand dollars, lawful money of the United States of America, to be paid to the said sheriff, or his certain attorney, executors, administrators or assigns, for which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals, and dated the tenth day of September, A. D. 1859.

Whereas, under and by virtue of a writ of attachment issued out of the third District Court, in the action of Henry Cox, plaintiff, against Joseph Park, defendant, directed and delivered to said John M. Murphy, sheriff of the county of Santa Clara, the said sheriff was commanded to attach and safely keep all the property of such defendant within his county not exempt from execution, or so much thereof as may be sufficient to satisfy the plaintiff's demand; and the said sheriff did thereupon attach the following described goods and chattels: [*here insert statement.*]

And whereas, upon the taking of the said goods and chattels by virtue of the said writ, the said Peter Hart claimed the said goods and chattels as his own property, and thereupon a jury was summoned by the said sheriff to try such claim, which said jury have by their finding decided in favor of said claim. And whereas, the said plaintiff, notwithstanding such finding, requires of said sheriff that he shall retain said property under such attachment, and in his custody.

Now, therefore, the condition of this obligation is such, that if the said Peter Hart, John Bond and William Doad, their heirs, executors and administrators, shall well and truly indemnify and save harmless him the said sheriff, his heirs, executors and administrators, of and from all damages, expenses, costs and charges, and against all loss and liability which he, the said sheriff, his heirs, executors and administrators, shall sustain or in anywise be put to, for or by reason of the retention by him, the said sheriff, in his custody, under said attachment, of the property claimed as aforesaid, then the above obligation to be void, otherwise to remain in full force and virtue.

Sealed and delivered	}	PETER HART.	[L. S.]
in presence of JAMES CRAIG.		JOHN BOND.	[L. S.]
		WILLIAM DOAD.	[L. S.]

*Sheriff's Receipt of Execution.*

Third District Court.

Peter O. Minor	}	County Sheriff's Office.
against		
Henri Douillet.		

Received from A. L. Rhodes, attorney for plaintiff in the above action, for collection and execution therein, endorsed, levy, and collect \$500, with interest from the fourth day of June, 1859, besides fees, &c., and returnable in sixty days to Santa Clara county clerk's office.

Dated June 30, 1859.

J. M. MURPHY, Sheriff of Santa Clara County.

By JOHN K. WILSON, Deputy.

*Certificate and Transfer of Sheriff on Sale of Personal Property—an Interest in a Contract.*

State of California.

In the District Court of the Twelfth Judicial District, in and for the County of San Mateo.

Henry Haws	}
against	
William Jones and Charles Brown,	

I, John W. Ackerson, sheriff of the said county of San Mateo, do hereby certify that, by virtue of an execution in the above

cause, tested the 31st day of October, A. D. 1858, by which I was commanded to make the amount of \$ , to satisfy the judgment in this action, with costs and interest thereon, out of the personal property of William Jones, one of the above defendants, and if sufficient personal property could not be found, then out of the real property belonging to the said defendant, William Jones, on the 17th day of August, A. D. 1858, or at any time thereafter, as by the same writ, reference being thereunto had, more fully appears; I have levied on, and this day sold at public auction, according to the statute in such case made and provided, to the above-named plaintiff, Henry Haws, who was the highest bidder, for the sum of five (5) dollars, which was the whole price paid by him for the same, the following-described personal property, to wit: all the interest of said defendant, William Jones, in a certain written contract in the Spanish language, entered into between, and signed by, Messrs. Jones & Parker, lawyers, of the one part, and Pedro Castillo of the other part, which contract is dated June 20, 1852, and is subscribed by James Church as a witness thereto, the original whereof is hereunto annexed.

That said personal property is not subject to redemption, therefore I, W. John Ackerson, sheriff, as aforesaid, in consideration of the premises, and of the said sum of five dollars, so bidden, and to me in hand paid by the said Henry Haws, do hereby sell, assign, transfer, and set over unto the said Henry Haws, his heirs, executors, administrators, and assigns, all the right, title, and interest of said defendant, William Jones, in and to the above-mentioned and described contract in the Spanish language, and hereto annexed, with all the benefits, rights, and remedies thereunto belonging, as fully and effectually as I, as such sheriff, may, can, or ought to sell, assign, transfer, and set over the same under and by virtue of the aforesaid execution.

In witness whereof, I, the said John W. Ackerson, sheriff, have hereunto set my hand and seal this second (2d) day of January, A. D. 1859.

JOHN W. ACKERSON. [L. s.]

Sealed and delivered }  
in presence of }

Sheriff, &c.

*Certificate of Sale of Real Estate on Execution.*

In the District Court of the Twelfth Judicial District, in and for the city and county of San Francisco, of the state of California:

Hubert H. Bancroft, }  
against  
Nahum Brown. }

I, Charles Doane, sheriff of the city and county of San Francisco, do hereby certify, that by virtue of an execution in the above cause, tested the tenth day of May, A. D. 1859, by which

I was commanded to make the amount of twenty-five thousand dollars, to satisfy the judgment in this action, with costs and interest thereon, out of the personal property of the above defendant, and if sufficient personal property could not be found, then out of the real property belonging to the said defendant, on the eighth day of May, 1859, or at any time thereafter, as by the said writ, reference being thereto had, more fully appears: I have levied on, and this day sold at public auction, according to the statute in such case made and provided, to George L. Kenny, who was the highest bidder, for the sum of ten thousand dollars, which was the whole price paid by him for the same, the real estate described as follows, to wit: [*description.*]

That the price of each distinct lot and parcel was as follows: parcel No. 1, five thousand dollars; parcel No. 2, five thousand dollars; and that the said real estate is subject to redemption, pursuant to the statute in such case made and provided.

Given under my hand, this thirtieth day of May, A. D. 1859.

CHAS. DOANE, Sheriff.

*Certificate of Sale under an Order of Sale.*

I, Charles Doane, sheriff of the city and county of San Francisco, in the state of California, do hereby certify, that under and by virtue of an order of state issued out of the District Court of the fourth judicial district, in and for the city and county of San Francisco, of the said state, in the action of Benjamin Lawrence against John Gudgeon, duly attested the tenth day of January, A. D. 1859, and to me, as such sheriff, duly directed and delivered, whereby I was commanded to sell the property hereinafter described, according to law, and to apply the proceeds of such sale toward the satisfaction of the judgment in said action, amounting to the sum of one thousand dollars, with interest and costs of suit, I duly levied on, and on the sixth day of January, A. D. 1859, at 12 o'clock, noon, at the court-house doors, in the city and county of San Francisco, I duly sold at public auction, according to law, and after due legal notice, to Beverly C. Duer, who made the highest bid therefor at such sale, for the sum of eight hundred dollars, which was the whole price paid, the real estate in said order of sale, described as follows, to wit: [*description.*]

And I do hereby further certify, that the said property was sold in one parcel, that the said sum of eight hundred dollars was the highest bid made, and the whole price paid therefor, and that the same is subject to redemption, pursuant to the statute in such case made and provided.

Given under my hand, this sixth day of January, A. D. 1859.

CHAS. DOANE, Sheriff, &c.

*Sheriff's Deed on Sale under Execution.*

This indenture, made this third day of August, A. D. 1859, between Charles Doane, sheriff of the city and county of San Francisco, of the first part, and Thomas Cole, Jr., of the city and county of San Francisco and state of California, of the second part: Whereas, by virtue of a writ of execution issued out of and under the seal of the District Court of the twelfth judicial district, of the state of California, in and for the said city and county, tested the fourth day of January, A. D. 1859, upon a judgment recovered in said court on the second day of January, A. D. 1859, in favor of George Wyckoff and against John Cook, to the said sheriff directed and delivered, commanding him that of the personal property of the said judgment debtor in his bailiwick, he should cause to be made certain moneys in the said writ specified, and if sufficient personal property of the said judgment debtor could not be found, that then he should cause the amount of said judgment to be made out of the lands, tenements and real property belonging to him, on the second day of January, A. D. 1859, or at any time afterward: and whereas, because sufficient personal property of the said judgment debtor could not be found, whereof he, the said sheriff, could cause to be made the moneys specified in said writ, he the said sheriff did, in obedience to said command, levy on, take and seize all the estate, right, title and interest which the said judgment debtor so had of, in and to the lands, tenements, real estate and premises hereinafter particularly set forth and described, with the appurtenances, and did, on the thirtieth day of January, A. D. 1859, sell the said premises at public vendue, in front of the city-hall, in the city of San Francisco, in said county, between the hours of nine in the morning and five in the afternoon of that day, namely, at twelve o'clock at noon, after having first given notice of the time and place of such sale, by advertising the same according to law: at which sale the said premises were struck off and sold to Thomas Cole, Jr., for the sum of ten thousand dollars, he, the said Thomas Cole, Jr., being the highest bidder, and that being the highest sum bidden, and the whole price paid for the same: and whereas, the said sheriff, after receiving from said purchaser the said sum of money so bidden as aforesaid, gave to him such certificate as is by law directed to be given, and filed in the office of the recorder of the county of San Francisco a duplicate of such certificate: and whereas, six months after such sale have expired, without any redemption of the said premises having been made:

Now this indenture witnesseth, that Charles Doane, the sheriff aforesaid, and party hereto of the first part, by virtue of the said writ, and in pursuance of the statute in such case made and pro-



vided, for and in consideration of the sum of money above mentioned, to him in hand paid as aforesaid, by the said party of the second part, the receipt whereof is hereby acknowledged, hath granted, bargained, sold, conveyed and confirmed, and by these presents doth grant, bargain, sell, convey and confirm unto the said Thomas Cole, Jr., his heirs and assigns, all the estate, right, title and interest of the said John Cook, which he had on the said second day of Jannary, A. D. 1859, or at any time afterward, or now has of, in and to all the following described premises, viz.: [*description*,] together with all and singular the hereditaments and appurtenances thereunto belonging, or in anywise appertaining, to have and to hold the said above mentioned and described premises with the appurtenances, unto the said Thomas Cole, Jr., his heirs and assigns forever, as fully and absolutely as he, the sheriff aforesaid, can, may or ought to, by virtue of the said writ and of the statute in such case made and provided, grant, bargain, sell, release, assign, convey and confirm the same.

In witness whereof, the said sheriff, the party of the first part, to these presents hath hereunto set his hand and seal, the day and year first above written.

CHAS. DOANE, [L. S.]

Sheriff, &c.

Sealed and delivered in the }  
presence of . }

State of California, }  
City and County of San Francisco, } ss.

On this            day of            , A. D. one thousand eight hundred and            , before me            , a notary public in and for said city and county, personally appeared Charles Doane, sheriff of the city and county of San Francisco, to me personally known to be the individual described in and who executed the foregoing instrument, and acknowledged to me that he, as sheriff aforesaid, executed the same freely and voluntarily, and for the uses and purposes therein mentioned.

In witness whereof, I have hereunto set my hand and affixed my official seal, the day and year first above written.

A. B., Notary Public.

*Sheriff's Deed of Property on Mortgage.*

This indenture, made this second day of August, A. D. 1859, between Charles Doane, sheriff of the city and county of San Francisco, of the first part, and Samuel S. Seward, of the city of San Francisco, of the second part, witnesseth:

Whereas, in and by a certain judgment or decree, made and entered by the District Court of the fourth judicial district of the state of California, in and for the city and county of San Francisco, on the tenth day of January, A. D. 1859, in a certain

*Sheriff's Deed on Sale under Execution.*

This indenture, made this third day of August, A. D. 1859, between Charles Doane, sheriff of the city and county of San Francisco, of the first part, and Thomas Cole, Jr., of the city and county of San Francisco and state of California, of the second part: Whereas, by virtue of a writ of execution issued out of and under the seal of the District Court of the twelfth judicial district, of the state of California, in and for the said city and county, tested the fourth day of January, A. D. 1859, upon a judgment recovered in said court on the second day of January, A. D. 1859, in favor of George Wyckoff and against John Cook, to the said sheriff directed and delivered, commanding him that of the personal property of the said judgment debtor in his bailiwick, he should cause to be made certain moneys in the said writ specified, and if sufficient personal property of the said judgment debtor could not be found, that then he should cause the amount of said judgment to be made out of the lands, tenements and real property belonging to him, on the second day of January, A. D. 1859, or at any time afterward: and whereas, because sufficient personal property of the said judgment debtor could not be found, whereof he, the said sheriff, could cause to be made the moneys specified in said writ, he the said sheriff did, in obedience to said command, levy on, take and seize all the estate, right, title and interest which the said judgment debtor so had of, in and to the lands, tenements, real estate and premises hereinafter particularly set forth and described, with the appurtenances, and did, on the thirtieth day of January, A. D. 1859, sell the said premises at public vendue, in front of the city-hall, in the city of San Francisco, in said county, between the hours of nine in the morning and five in the afternoon of that day, namely, at twelve o'clock at noon, after having first given notice of the time and place of such sale, by advertising the same according to law: at which sale the said premises were struck off and sold to Thomas Cole, Jr., for the sum of ten thousand dollars, he, the said Thomas Cole, Jr., being the highest bidder, and that being the highest sum bidden, and the whole price paid for the same: and whereas, the said sheriff, after receiving from said purchaser the said sum of money so bidden as aforesaid, gave to him such certificate as is by law directed to be given, and filed in the office of the recorder of the county of San Francisco a duplicate of such certificate: and whereas, six months after such sale have expired, without any redemption of the said premises having been made:

Now this indenture witnesseth, that Charles Doane, the sheriff aforesaid, and party hereto of the first part, by virtue of the said writ, and in pursuance of the statute in such case made and pro-

tenements, hereditaments, and appurtenances thereunto belonging, or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof, and also all the estate, right, title, and interest, property, possession, claim, and demand whatsoever, as well in law as in equity, of the said party of the first part, and of the said defendant, Paul Sampson, of, in, and to the above-described premises, and every part and parcel thereof.

To have and to hold, all and singular, the premises above mentioned and described, and hereby conveyed, or intended so to be, together with the appurtenances, unto the said party of the second part, his heirs and assigns, to his and their own proper use, benefit and behoof forever.

In witness whereof, the said party of the first part to these presents hath hereunto set his hand and seal, the day and year first above written.

CHARLES DOANE. [L. S.]

Sealed and delivered in the presence }  
of Wm. MERRIAM.

*Sheriff's Deed, for Land sold on Execution to satisfy Balance due after Mortgage Sale.*

This indenture, made this                      day of                      , A. D. one thousand eight hundred and fifty-eight, between John W. Ackerson, sheriff of the county of San Mateo and state of California, acting in his official capacity as such, party of the first part, and Horace Hawes, of the city and county of San Francisco, and state aforesaid, party of the second part, witnesseth :

Whereas, by a certain writ of execution issued out of the District Court of the twelfth judicial district in and for San Mateo county in said state, directed and delivered to the said party of the first part, sheriff as aforesaid, tested the sixth day of March, A. D. one thousand eight hundred and fifty-eight, he, the said sheriff, was commanded to satisfy the deficiency or balance due on a certain judgment rendered and docketed in the above-named court, in the action of said Horace Hawes *vs.* Ephraim Bland, which said deficiency was the sum of fifty-five thousand eight hundred and eighty-eight  $\frac{00}{100}$  dollars (\$55,888 $\frac{00}{100}$ ), together with interest, costs and accruing costs, out of the personal property of the said

, or, if sufficient could not be found, then out of the real property belonging to him, on the day when the said judgment was docketed in the aforesaid county of San Mateo, or at any time thereafter : and whereas the said John W. Ackerson, sheriff as aforesaid, and party of the first part hereto, after receiving said writ, and before the return day thereof, did, by virtue of the same, levy or seize and take the lands hereinafter described, for want of sufficient personal property to satisfy the said defi-

directly or indirectly due on said judgment and file in pursuance of said act a response conformably with the above-mentioned statute, and of the statute in such case made and provided, on the twenty-seventh day of March, A. D. one thousand eight hundred and fifty-eight, in front of the court-house of said county of San Mateo, sell at public auction and singular the premises hereinafter described in separate and distinct tracts or parcels, as the same are hereafter described, having first given due public notice of the time and place of sale, in the manner prescribed by law, at which sale said and singular the premises hereinafter described and mentioned as aforesaid were struck off to the said Horace Hawes, party of the second part hereto, for the aggregate amount of two hundred and fifty dollars, namely: the tract of land firstly hereinafter described, for the sum of one hundred dollars (\$100); the tract of land secondly hereinafter described, for the sum of one hundred (100) dollars, and the tract of land thirdly hereinafter described, for the sum of fifty (50) dollars, the said Horace Hawes, the party of the second part hereto, being the highest and best bidder for each of said tracts of land, and those several sums being the highest sums bidden, and the whole price paid therefor, making in the aggregate the said sum of two hundred and fifty dollars. And whereas, after receiving from the said purchaser the said sum of money by him so bidden as aforesaid, the said John W. Ackerson, sheriff as aforesaid, gave to him, the said Horace Hawes, purchaser as aforesaid, a certificate of sale in the form required by law; and a duplicate thereof was duly filed in the office of the county recorder of the said county of San Mateo, the said premises sold being subject to redemption, and the time for the redemption thereof prescribed by law having now expired, and the same not being redeemed: now therefore, this indenture witnesseth, that the said John W. Ackerson, sheriff of the said county of San Mateo, and party of the first part to these presents, in order to carry into effect the said sale, made in pursuance of the execution aforesaid, and by virtue of the statute in such case made and provided, in consideration of the premises and of the sum of two hundred and fifty dollars so bidden and paid at the time of the sale, by the said party of the second part to the said John W. Ackerson, sheriff as aforesaid, the receipt whereof he doth hereby acknowledge, hath granted, bargained, sold, aliened, released, conveyed and confirmed, and by these presents doth grant, bargain, sell, alien, release, convey and confirm unto the said party of the second part, his heirs and assigns forever, the real estate described as follows, to wit: [*here insert description,*] and also all the estate, right, title, interest, trust property, claim and demand which the said Ephraim Bland had in the said several tracts or parcels of land, or any part thereof, on the 17th

day of August, A. D. 1857, being the day when the said judgment was docketed in the aforesaid county of San Mateo, or upon the day when the aforesaid levy was made, under and by virtue of the hereinbefore mentioned execution, or had at any time since or now hath: to have and to hold the said above-granted and described tracts of land and premises, and every part and parcel thereof, with the rights, privileges, hereditaments and appurtenances thereto belonging, or in anywise appertaining unto the said party of the second part, his heirs and assigns forever, as fully and absolutely as the said party of the first part, in his official capacity of sheriff as aforesaid, and under the authority aforesaid, may, can or ought to grant, sell or convey the same.

In witness whereof the said party of the first part has hereunto set his hand and seal, the day and year first hereinbefore written.

JOHN W. ACKERSON, Sheriff, &c. [L. s.]

Sealed and delivered }  
in presence of }

## CHAPTER XXXVII.

## TAXES.

ALL property of every kind and nature whatsoever, within this state, shall be subject to taxation, except:

1. All lands and lots of grounds with buildings, improvements and structures thereon, belonging to the state or to any municipal corporation, or to any county of the state, and all lands belonging to the United States, or to this state, and all buildings and improvements belonging to the United States or to this state.

2. Court-houses, jails, town-halls, council chambers, market-houses, belonging to any county or municipal corporation; houses occupied by fire-companies, and their apparatus, and other public structures and edifices, and all squares and lots kept open for health or public use, or for ornament, belonging to any county, city, town, or village in this state.

3. Colleges, school-houses and other buildings for the purposes of education, with their furniture, libraries, and all other equipments, and the lots or lands thereto appurtenant and used therewith, so long as the same shall be used for that purpose, unless the same are private property from which a rent or valuable consideration for their use is derived, in which latter case they shall be taxed as other property.

4. Public hospitals, asylums, poor-houses, and other charitable or benevolent institutions for the relief of the indigent and afflicted, and the lots or lands thereto appurtenant, with all their furniture and equipments, so long as the same shall be used for that purpose only, and without pecuniary gain.

5. Churches, chapels, and other buildings for religious worship, with their furniture and equipments, and the lots of ground appurtenant thereto, and used therewith; *provided* rent is not paid for such ground, so long as the same shall be used for such purpose only, without yielding rent.

6. Cemeteries and graveyards set apart and used for the purpose of interring the dead.

7. The property of widows, or orphan children, to the amount of one thousand dollars.

8. Growing crops.

9. Mining claims.<sup>1</sup>

The following provision applies only to the city and county of San Francisco:

In all cases where property other than growing crops or mining claims is claimed as exempted from taxation under the provisions of this section, by any person, association or corporation, except the United States, or the state of California, such person, association or corporation, in order to entitle himself or themselves to the benefit of such exemption, shall make a statement in writing to the tax collector, setting forth the property claimed to be exempted, by whom such property is owned, and the reason for such exemption. Such statement shall be verified by the oath of the person claiming such exemption, or of some person on his behalf, and where the statement is made by an association or corporation, it shall be verified by the oath of some person on behalf of said association or corporation. The tax collector, or any of his deputies, is hereby authorized and empowered to administer such oath, and to prescribe the form thereof without charge. Such statement in writing, duly verified as aforesaid, shall be delivered to the tax collector prior to the third Monday of October in each year.<sup>2</sup>

It is also provided, that in San Francisco, every person, corporation or company owning property in the county, or having it in his possession or under his control, must render a statement thereof to the city and county assessor between the first Monday of February and the second Monday in March, the requisites of which are set forth in the following forms, entitled "Statement of Property Rendered for Assessment," and "Affidavit to be Made to Foregoing Statement." Such statement is final and conclusive as to personal estate.<sup>3</sup>

If such statement be not given in, it is the duty of the assessor of the city and county of San Francisco to assess such

<sup>1</sup> Laws 1857, p. 336.

<sup>2</sup> *Id.* 844, 845.

<sup>3</sup> *Id.* 1859, pp. 843, 844.

property and fix the value thereof; and his valuation shall be conclusive and without appeal, so far as personal estate is concerned, and shall be final and conclusive so far as real estate is concerned, unless such estimate is altered by the board of equalization.<sup>1</sup>

In the other counties of the state, the county assessor is required, between the first Monday of March and the first Monday of August, to demand from every person and company, a statement under oath, of their property, or that in their charge; and if such person or company neglects or refuses to give the assessor such statement under oath, or if the owner or claimant of any property be unknown, or absent or non-resident, and no statement be given for such owner, the assessor fixes the value of the property, and his valuation is conclusive upon personal estate; and final and conclusive upon real estate and improvements on public lands, unless such estimate is altered by the board of equalization.<sup>2</sup>

The supervisors of the county constitute the board of equalization. The board meet on the second Monday of August, and continue in session from time to time till the business of equalization presented to them is disposed of; not however beyond the second Monday in September. When the board is in session they may hear complaints as to assessment, and reduce the valuation where it has been assessed too high, and raise it where it has been assessed too low.<sup>3</sup>

In the case of *Moore vs. Patch*, a suit in regard to the legality of certain taxes, the Supreme Court remarks as follows:

"A general impression seems to prevail that no tax sale can be made which will be effectual to pass title. Without expressing any opinion on the facts of any given case, it may not be out of place to suggest that consequences of a serious character may result to owners of property by a too confident reliance upon the idea that taxes may be left unpaid with impunity."

Each male inhabitant of this state over twenty-one years of age, and not by law exempt from poll-tax, shall pay a poll-tax for the use of the state and county of three dollars, between the

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<sup>1</sup> Laws 1859, pp. 345, 346.

<sup>2</sup> *Id.* 1857, p. 329.

<sup>3</sup> *Id.* 1857, pp. 326, 327.



first day of March and the first Monday of August. If not paid before the first Monday of August, it shall be four dollars.<sup>1</sup>

#### STAMP DUTY.

The following duty or stamp tax is hereby imposed on every sheet or piece of paper, parchment, or other material upon which may be written, printed, engraved, or lithographed, or other means of designation, on either of the following-described instruments, to wit:

Any bill of lading, contract, agreement, or obligation for the transportation or conveyance from any point or place in this state, to any point or place without the limits of this state, of any sum, amount, or quantity of gold or silver coin, in whole or in part, gold-dust, or gold, or silver, in bars or other form, by or between any person or persons, firm or firms, corporation or corporations, or other associations, either as principal or agent, or attorney, or consignee, or consignor, to wit: for one hundred dollars, thirty cents; and all sums over one hundred dollars a stamp tax or duty of one-fifth of one per cent. upon the amount or value thereof, the payment whereof to be included in the bill of lading, contract, or agreement, or obligation for the transportation or conveyance thereof, as in this section provided, having attached thereto, or stamped thereon, a stamp or stamps, expressing, in value, the amount of such tax duty.

Any license to practise, or certificate of admission of any attorney at law, granted by any court in this state, ten dollars.

Any policy of insurance, contract, or instrument in the nature thereof, upon any house, factory, machinery, ship, steamer, or vessel of any description, any goods, wares, or merchandise, or furniture, or any life insurance, if to run for one year or more, one-half of the duty levied on bills of lading, as herein provided; if for nine months and not more than twelve months, three-fourths of the rates last above established; if for six months and not over nine months, one-half of the above established rates; if for three months and not over six months, one-fourth of the above established rates.

Any receipt for the payment for, or any contract, certificate, or

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<sup>1</sup> Laws 1867, p. 242.

memorandum or remuneration relative to the purchase of passage from this state to another place out of the limits thereof, upon any vessel or steamship—if for a first-class passage six dollars, and if for a second class passage four dollars, and if for a steerage passage two dollars.

*Provided*, that nothing in this act shall be construed to affect, in any way, the official drafts or shipments of treasure at the offices of the United States or of this state.<sup>1</sup>

No instrument or writing whatever, charged with the payment of duty as aforesaid, shall be pleaded, or set up, or given in evidence in any court, or admitted to be available in law or equity, but shall be and remain absolutely void, unless the same shall be stamped or marked as aforesaid.<sup>2</sup>

#### LICENSES.

There shall be levied and collected a quarterly yearly license tax, as follows: 1. From each proprietor or keeper of a billiard table, not kept for the exclusive use of the owner or his family, for each table, ten dollars per quarter. For a nine or ten-pin or bowling alley, ten dollars for each alley; license to be granted for a term not less than three months, to be paid to the county treasurer. 2. From the manager or lessee of every theatre, five dollars per day, if granted for a less time than one month. If granted for one month, one hundred dollars shall be paid. If granted for three months, two hundred dollars. If granted for one year, six hundred dollars. And for each exhibition of serenaders, or opera or concert singers, the same pay for license as is required for theatrical performances, to be paid to the county treasurer. 3. For each caravan, menagerie, exhibition for pay of bull and bear, or any collection of animals for public amusement, twenty dollars for each exhibition; and for each show of any figures, and for each circus, rope or wire dancing, or sleight of hand exhibition for reward, ten dollars per day, to be paid to the county treasurer; *provided*, that any collections of animals and fowls, natives of California and the Sierra and Rocky Mountains be excluded from the provisions of this act. 4. From each and every insurance company, incorporated by laws of this state and

<sup>1</sup> Laws 1858, p. 305.

<sup>2</sup> Wood's Dig. art. 8095.

transacting an insurance business therein, twenty-five dollars per quarter year. 5. From each and every insurer or insurance company, foreign or otherwise, not chartered by this state, and transacting an insurance business therein, or agent or agents thereof, one hundred dollars per quarter.<sup>1</sup>

Licenses shall be obtained by the person or persons, private association or corporation doing business in this state, engaged in one or all of the following occupations, to wit: in buying or selling foreign or inland bills of exchange, or in loaning money at interest, or in buying or selling notes, bonds or other evidences of indebtedness of private persons, or state, county or city stocks, or stocks of incorporated companies, or in buying or selling gold dust, gold or silver bullion, gold or silver coin, keepers of savings banks or engaged as common carriers in transmitting or conveying gold-dust, gold or silver coin or bullion, from any place in this state to any place without this state, or from one to another place within this state, for profit, or engaged in receiving general or specific special deposits of gold-dust, gold or silver coin or bullion, for profit; *provided*, that checks used in the transaction of business between parties within this state, shall not be included as being liable to the provisions of this act.<sup>1</sup>

Brokers, such as deal in stocks, state, city or county securities, and dealers in gold-dust, shall be divided into five classes, as follows: those doing business to the amount of two hundred and fifty thousand dollars per quarter, and over, shall constitute the first class; those doing business to the amount of two hundred thousand dollars, and less than two hundred and fifty thousand dollars per quarter, shall constitute the second class; those doing business to the amount of one hundred thousand dollars, and less than two hundred thousand dollars per quarter, shall constitute the third class; those doing business to the amount of fifty thousand dollars, and less than one hundred thousand dollars per quarter, shall constitute the fourth class; those doing business in any amount under fifty thousand dollars per quarter, shall constitute the fifth class. The license shall be obtained from the county auditor, and shall be given for the first class upon the payment of one hundred dollars per quarter; for the second

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<sup>1</sup> Wood's Dig. art. 8051-8058.

class, eighty dollars per quarter; for the third class, forty dollars per quarter; for the fourth class, twenty dollars per quarter; for the fifth class, fifteen dollars per quarter. Said amounts to be paid to the county treasurer, or collector of taxes of the county in which the party applying therefor desires to or does transact any one or all of the occupations specified in section one, and a separate license shall be obtained for each branch establishment, or separate house of such business located in the same county.<sup>1</sup>

Bankers and dealers in exchange shall be divided into five classes, as follows: those drawing bills of exchange or drafts to the amount of five hundred thousand dollars or over, per month, shall constitute the first class; those drawing bills of exchange or drafts to the amount of three hundred thousand dollars, and less than five hundred thousand dollars per month, shall constitute the second class; those drawing bills of exchange or drafts to the amount of two hundred thousand dollars, and less than three hundred thousand dollars per month, shall constitute the third class; those drawing bills of exchange or drafts to the amount of one hundred thousand dollars per month, and less than two hundred thousand dollars per month, shall constitute the fourth class; those drawing bills of exchange or drafts in any amounts less than one hundred thousand dollars per month, shall constitute the fifth class. The license for the first class shall be given upon the payment of one hundred dollars per month; for the second class, upon the payment of sixty dollars per month; for the third class, upon the payment of forty dollars per month; for the fourth class, upon the payment of twenty dollars per month; for the fifth class, upon the payment of fifteen dollars per month.

On the party paying the county treasurer or the collector of taxes an amount of money for license in proportion to the estimated amount of business specified in this article, and designating the town, city or particular locality of the business establishment, or branch thereof, for which the license is desired, the treasurer shall thereupon execute and deliver to such party a receipt therefor, in which he shall specify the amount of money paid, by whom paid, and the town, city or particular locality:

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<sup>1</sup> Wood's Dig. art. 3051-3058.

1. Upon the presentation of said receipt, the county auditor shall issue and deliver a license to the party, under the seal of his office, in which license shall be stated the kind of business authorized to be transacted, and the town, city or particular locality of such business establishment or branch. The auditor shall thereupon charge the county treasurer with the amount of money specified in said receipt, in a book kept for that purpose, and shall file said receipt as a voucher in his office. The auditor shall be entitled to demand and receive one dollar, one-half of which shall be for the use and benefit of the county treasurer, for each license issued by him under this act, to be collected from the person receiving such license, and in no case shall any other fee be allowed to auditors for any service connected with the issuance of licenses. 2. The license thus obtained shall authorize the party to transact any or all the kinds of business or occupation therein specified, at or within the town, city or particular locality specified in the same, within the limits of the county where obtained, during the term of three months from the date thereof, and no longer; but may be renewed at the expiration of the term of three months, subject to change by the auditor's estimate, or by the affidavit of the party desiring removal, if no new estimate be made by the auditor.<sup>1</sup>

3. Persons engaged in carrying letters, papers or documents from one part of this state to another, shall not be liable to obtain licenses for that purpose. 4. Licenses may be procured by the party in person, by agent or attorney, or by any one partner in the name of all the copartners; and in cases of corporations, by application by the president, secretary or attorney of such corporation; and the party in every instance making the application, shall make and subscribe an affidavit or affirmation before the county treasurer, who is hereby empowered to administer the same, that he verily believes that the amount of business to be done by the business establishment, or branch thereof, within the next succeeding three months, will not exceed the estimate under which he applies for license; and in all cases where an under estimate has been made, the party having made such under estimate shall be required to pay the amount neces-

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<sup>1</sup> Wood's Dig. art 8051-8062.

sary to make up the deficit before a new license shall issue. Licenses shall be procured immediately before the commencement of any business or occupation liable to license under this article, and shall be renewed quarterly thereafter.<sup>1</sup>

5. If any person or persons, corporation or corporations, or their agents, or the agent or agents of any banker or other person or persons, pursuing or commencing any of the occupations required by this article first to be licensed, neglect to take out or procure his or their license or licenses, in the manner provided by this article, within ten days from the time of commencing the business required by this article first to be licensed, one hundred per cent. shall be added to the amount which such person or persons, or corporations, would have been liable to pay; and it shall be the duty of the sheriff of the county to proceed immediately to the seizure and sale of the goods, wares, rights and chattels of any person or persons, corporation or corporations, so neglecting to pay the amount of their licenses in the manner provided by this article, in order to pay the amount of the license (with the addition of one hundred per cent. thereto), together with the costs of the seizure and sale; and in all such cases of neglect, it is hereby made the duty of the auditor to furnish the sheriff with an estimate of the amount due from the party so neglecting to procure license, but the sheriff shall proceed upon any other information; and upon any wilful neglect on the part of the sheriff, it shall be the duty of the district attorney to proceed against him upon his bond, and he shall be liable to pay double the amount of the license so neglected to be collected.

Every person who may deal in goods, wares and merchandise, wines or distilled liquors, except the agricultural productions of this state, and except such as are sold by auctioneers or commission merchants under license, or permission according to law, shall quarterly pay an amount of money for license as required by the class in which such person is placed by the auditor of the county under the provisions of the succeeding section; *provided, always*, that nothing herein shall be construed to extend to physicians, surgeons, apothecaries or chemists, as to any wines or

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<sup>1</sup> Wood's Dig. art. 3051-3052.

spirituous liquors which they may use in the preparation or compounding of medicines for sick persons.<sup>1</sup>

Every person who shall sell or vend any goods, wares or merchandise, wines or distilled liquors, drugs or medicines, jewelry, or wares of precious metals, and persons who keep horses or carriages for rent or hire, except mules, horses or animals used in transportation of goods, shall obtain from the treasurer of the county in which such business may be transacted, for any or all the branches of business herein enumerated, a license for the transaction of such business, at the following rates, to wit: all persons dealing as aforesaid, shall be classed according to the amount of average monthly sales or of rents effected, in the following manner, that is to say: those who are estimated to make average monthly sales to the amount of one hundred thousand dollars or more, shall constitute the first class; of seventy-five thousand dollars, and less than one hundred thousand dollars, shall constitute the second class; of fifty thousand dollars, and less than seventy-five thousand dollars, shall constitute the third class; of forty thousand, and less than fifty thousand dollars, shall constitute the fourth class; of thirty thousand and less than forty thousand dollars, shall constitute the fifth class; of twenty thousand, and less than thirty thousand dollars, shall constitute the sixth class; of ten thousand, and less than twenty thousand dollars, shall constitute the seventh class; of five thousand, and less than ten thousand dollars, the eighth class; of one thousand, and less than five thousand dollars, the ninth class; of all amounts under that sum, the tenth class. The license for the first class shall be given upon the payment of fifty dollars per month; for the second class, thirty-seven dollars and fifty cents per month; for the third class, twenty-five dollars per month; for [the] fourth class, twenty dollars per month; for the fifth class, fifteen dollars per month; for the sixth class, ten dollars per month; for [the] seventh class, seven dollars and fifty cents per month; for [the] eighth class, five dollars per month; for the ninth class, three dollars seventy-five cents per month; for [the] tenth class, two dollars and fifty cents per month; *provided*, that the sale of liquors or wines, by persons licensed under this sec-

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<sup>1</sup> Wood's Dig. art. 8051-8052.

tion, shall not be in less quantity than one quart measure. The moneys collected for licenses provided to be granted by this and the preceding section of this article, shall be paid to the county treasurer for state purposes, except classes ninth and tenth, which shall be paid into the county treasury for county purposes. The auditor shall furnish the treasurer with blank licenses for each class, for which he shall take a receipt, and the treasurer shall settle such accounts with the auditor as often as once in each month; *provided*, that in the counties of Klamath and Humboldt, the treasurer may deliver to the sheriff blank licenses; *provided*, the treasurer shall be responsible for the same, and the sheriff shall make no extra charge for collection.<sup>1</sup>

All tavern or inn keepers, and all persons who may sell or dispose of any spirituous, malt or fermented liquors or wines, in less quantities than one quart, shall, before the transaction of any such business, take out a license or licenses from the county treasurer, as prescribed in this act, and make therefor the following payment, to wit: those making sales to the amount of ten thousand dollars or more, as a monthly average, shall constitute the first class; sales to the extent of five thousand, and not exceeding ten thousand dollars as a monthly average, shall constitute the second class; and all sales less than five thousand dollars, shall constitute the third class; the license to be paid by the venders of the first class, shall be forty dollars per month; of the second class, shall be twenty dollars per month; of the third class, shall be five dollars per month.<sup>1</sup>

Each travelling merchant, hawker or peddler, who shall carry a pack and vend wares, goods or merchandise of any kind, shall pay for each license ten dollars per month, and every such travelling merchant, hawker or peddler, who shall use a wagon for the purpose of vending any wares or merchandise of any kind, or wines or spirituous liquors, shall pay for each license or licenses, thirty dollars per month; *provided*, that nothing herein contained shall be so construed as to apply to the productions of this state. Any county auditor in the state shall be authorized to issue the license contemplated in this section, which license so issued shall authorize the holder of the same to vend goods,

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<sup>1</sup> Wood's Dig. art. 3251-3253.



wares and merchandise, as set forth in such license, in any county in this state, and it is hereby made the duty of every justice of the peace and constable, to demand the license of any such peddler or hawker; and if such person be found not to have a license as directed by law, the person so offering any goods or wares for sale shall be fined by any justice of the peace, in any sum not less than fifty dollars, nor more than one hundred dollars.<sup>1</sup>

The licenses provided to be granted by this article, shall be granted for three, six and twelve months, at the option of the party applying for such licenses. Every person who shall transact or carry on any business specified in this article, without first procuring the license required, for each and every offence shall be liable to an action in the name of the county or of the state, as the case may be, in any court of competent jurisdiction, for double the amount of [the] required license, with cost of prosecution; and it is hereby made the duty of the district attorney to prosecute the suits provided for in the articles two, three and four of this act, and violations of the provisions of article two; and in case judgment shall be obtained against the party prosecuted, the court shall tax, as cost, against the defendant, the sum of fifteen dollars as district attorney's fees, and include the same in the judgment; and the moneys, less attorney's fees, when received, shall be paid to the county treasurer, for state or county purposes, as the case may be.<sup>1</sup>

#### PASSENGER BROKER'S LICENSE.

Every passenger broker shall apply monthly to the county auditor for a license to pursue his said business, accompanying his application with a sworn statement, specifying the aggregate amount of the gross proceeds of sales, if any there be, arising out of his business for the previous month, and an estimate of the amount of the gross proceeds of sales for the next ensuing month, and further designating the city or county in which said business will be followed; and the county auditor, upon receiving said application, is hereby required to give to the applicant his written direction to the county treasurer to issue a license to the said passenger broker, upon the receipt of a sum of money to

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<sup>1</sup> Wood's Dig. art. 8051-8058.

be designated in said written direction, which sum shall be equal to one per centum on the estimated amount of the gross proceeds of sales, as set out in the sworn statement, and thereupon the said county auditor shall charge the county treasurer with the amount due on said license; but upon its appearing that the said license was not issued, the latter shall then be discharged. Upon the receipt of said written direction, and payment of the sum of money therein specified, for the use of the general fund of the state, the county treasurer shall make out and deliver a license to the party applying to pursue the business of a passenger broker for one month from date.<sup>1</sup>

Upon any application for a license as aforesaid, the county auditor is required to examine the sworn statement of the applicant, showing the gross proceeds of sales in his business for the last month, and if the aggregate of these sales exceed by ten per cent. the estimate upon which the license for the preceding month was issued, then the county auditor is required to add to the amount of the license for the ensuing month, a sum equal to one per centum upon the excess of the receipts of the last month over the said estimate, and to express this amount in his written direction to the county treasurer, who shall only issue the license as aforesaid upon the payment of the entire sum specified by the said auditor.<sup>1</sup>

The county treasurer shall be authorized to demand and receive, before issuing the license, the additional sum of one dollar, for his own use, and one dollar for the services rendered by the county auditor.<sup>1</sup>

Any person pursuing the business of passenger broker in this state, without previously having a license therefor, as herein provided, shall be liable for each and every day he may pursue the said business without the said license, to a fine of five hundred dollars, to be recovered in any court of competent jurisdiction, in the name of the people of the state, on the relation of any citizen thereof, one-half of which said fine shall be for the use of the state, and the other half for the use of the relator.<sup>1</sup>

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<sup>1</sup> Wood's Dig. art. 8126-8129.

## FOREIGN MINER'S LICENSE.

No person, not being a citizen of the United States, or who shall not have declared his intention to become such, prior to March 30, 1853 (California Indians excepted), shall be allowed to take gold from the mines of this state, or hold a mining claim therein, unless he shall have a license therefor, as hereinafter provided.<sup>1</sup>

The tax to be paid for each license shall be four dollars per month, and said license shall in no case be transferable.<sup>2</sup>

The collector may seize the property of any person liable to, and refusing to pay such tax, and sell at public auction at one hour's notice, by proclamation, and transfer the title thereof to the person paying the highest price therefor, and after deducting the tax and necessary expenses incurred by reason of such refusal and sale of property, the collector shall return the surplus of the proceeds of the sale, if any, to the person or persons whose property was sold; *provided*, that should any person liable to to pay such tax in any county of this state, escape into any other county with the intent to evade the payment of such tax, then and in that event it shall be lawful for the collector to pursue such person, and enforce the payment of such tax in the same manner as if no such escape had been made. Any foreigner representing himself to be a citizen of the United States, shall, in absence of his certificate to that effect, satisfy the collector of the correctness of his statement by affidavit or otherwise, and that the collector be and is empowered to administer such oath or affirmation. All foreigners residing in the mining districts of this state shall be considered miners under the provisions of this act, unless they are directly engaged in some other lawful business avocation.<sup>3</sup>

Any person or company hiring foreigners to work in the mines of this state, shall be liable for the amount of the licenses for each person so employed.<sup>4</sup>

## JUDICIAL DECISIONS.

The act of May, 1853, does not violate that clause of the federal constitution which guarantees to the citizens of each state

<sup>1</sup> Wood's Dig. art. 8107.

<sup>2</sup> Id. 8110.

<sup>3</sup> Id. 8114.

<sup>4</sup> Id. 8121.

the same privileges and immunities which they are entitled to in their own states.

The tax is not levied on the foreign owner of consigned goods in the hands of the consignee, but only upon their sale. All other consigned goods are taxed by the system of licenses, as part of the general property of the state.<sup>1</sup>

The fact that the title of land is in dispute between the claimants and the United States, and that the claimants under a Mexican grant are not in possession, affords no ground for exempting the land from taxation.<sup>2</sup>

The claimants are either the owners or they are not; if they are, they must pay the taxes on the land; if they are not, they have nothing to do with the matter, and cannot enjoin the collection of taxes, having no authority to sue or defend for the United States.<sup>3</sup>

A. and Co. having on general deposit with B. and Co., of Marysville, seventy-five thousand dollars, a tax for county purposes was levied thereon, and payment demanded, both of B. and Co. and A. and Co.: *held*, that the tax was legal.<sup>4</sup>

The levy of the tax created a judgment and lien on the property, having the force and effect of an execution, and could be enforced in the same manner.<sup>5</sup>

The listing and valuation of real estate, for the purpose of taxation, is an essential prerequisite to the validity of all subsequent proceedings. The assessment must be made by the assessor.<sup>6</sup>

If no valuation was placed by the assessor upon the property, none can be placed upon it by the board of equalization. The board may alter the valuation, in order to equalize it, but cannot place the valuation in the first instance.<sup>7</sup>

The board of equalization has no such arbitrary power as would authorize it, without notice, or evidence, or opportunity to the taxpayer to be heard, to increase his taxes indefinitely without right of appeal.<sup>8</sup>

The legislature has a right to authorize a local tax for the purpose of internal improvements; that it may authorize the local authorities to impose the tax; this may be done upon petition or

<sup>1</sup> 4 Cal. 46.

<sup>2</sup> 6 id. 378.

<sup>3</sup> 7 id. 85.

<sup>4</sup> 10 id. 539.

<sup>5</sup> *Patten v. Green*, April Term, 1869.

without it, or in case of a vote for the proposition, and it is not essential that the improvement should be within or confined to the locality taxed, and a subscription for stock to be paid for by taxation, is a valid contract to pay it.<sup>1</sup>

When taxes are due, and have not been collected in the year when they should have been collected, on account of informalities in the prerequisite proceedings with reference to collection, the legislature may pass a subsequent act to cure such, legalizing such taxes, and giving a remedy for their collection.<sup>2</sup>

## FORMS.

*Statement of Property rendered for Assessment in San Francisco.*

FISCAL YEAR, ENDING JUNE 30TH, 1860.

STATEMENT OF PERSONAL PROPERTY BELONGING TO OR UNDER THE CONTROL OF

Household and kitchen furniture, Law, medical, and miscellaneous libraries,		
Value,	dollars.	\$000 00
Stock of goods on hand, all goods, wares, merchandise and chattels of every description,		
Value,	dollars.	000 00
Money on hand or on deposit, in bank or banks, or with individuals, and all gold-dust,		
Value,	dollars.	000 00
Horses, mules, oxen, cows, calves, beef cattle, hogs, sheep, goats, jacks and jennies, and cattle of every description, wagons, carriages, and all other vehicles, whether for use, pleasure, or for hire,		
Value,	dollars.	000 00
Machines and machinery, and all works and improvements of a movable nature,		
Value,	dollars.	000 00
Storeships and hulks, all steamers, vessels and watercraft of every kind and name, either owned in whole or in part by a resident or residents of the state or registered in this state, or navigating the waters of any river or bay within this state, or having a general depôt or terminus within this state, giving the name		

<sup>1</sup> Pattison v. Supervisors Yuba Co., April Term, 1854.

<sup>2</sup> Moore v. Patch, January Term, 1859; Cowell v. Doub, January Term, 1860.

**All other property not real estate, which is not otherwise taxed,**

Value, dollars. 000 00  
The total value of the above-mentioned personal property amounts to dollars. \$000 00  
Signed, this day of , 1859.

STATEMENT OF REAL ESTATE, INCLUDING IMPROVEMENTS THEREON, BE  
LONGING TO OR CLAIMED BY

(Please place "Improvements" in separate lines from "Land.")

	VALUE.
50 vara lot, No. 217 (five thousand dollars) - - -	\$5,000 00
Improvements on same (five thousand dollars) - -	5,000 00
&c., &c.	

N. B.—Valuations of property must be written out in full, as well as be put down in figures.

*Affidavit to be made to foregoing Statement.*

State of California, } ss.  
City and County of San Francisco, }  
I, \_\_\_\_\_, do solemnly swear that the annexed statement contains a full, true and complete statement of all the different kinds of property owned or claimed by \_\_\_\_\_, situate, lying and being within the city and county of San Francisco, in the possession, charge or control of said \_\_\_\_\_, that the value of such property, and of each and every kind thereof, given in said statement, is true, to my knowledge and belief; that said \_\_\_\_\_, ha \_\_\_\_\_ no property of any kind or nature, neither ha \_\_\_\_\_ the possession, charge or control, or any interest in any property, whether real, personal or mixed, situate, lying and being within said city and county, other than the property mentioned and described in said statement. So help me God.

[illegible]



*Certificate of Sale of Real Estate, for Non-Payment of State, and San Francisco City and County Taxes, for the Fiscal Year 1858-59.*

No.	Block	Page
<p>State of California, }  City and County of San Francisco, } ss :</p>		
<p>I, Jonathan Hunt, tax collector of the city and county of San Francisco, do hereby certify that, by virtue of an act of the legislature of the state of California, entitled "An Act to provide Revenue for the Support of the Government of this State," approved April 29th, 1857; and "An Act to amend the same," approved April 24th, 1858; and also an act, entitled "An Act to provide for the Funding and Payment of the outstanding unfunded Claims against the City of San Francisco and against the County of San Francisco, as they existed prior to the first day of July, A. D. one thousand eight hundred and fifty-six," approved April 20th, 1858; I, as tax collector of the city and county aforesaid, did, on the 18th day of October, 1858, levy upon the property of which description is first hereafter given in this certificate, for taxes due to the state of California, and to the city and county of San Francisco, together with the costs and charges due thereupon; that the said property was assessed for the fiscal year 1858-1859 to and to all owners and claimants known or unknown: that said taxes were levied upon it according to law: that said taxes were not and had not been paid, and at the time of the sale hereinafter spoken of still remained due and unpaid: that publication of the intention to sell for the taxes, including said property for said taxes, was made as provided by law: that said publication was made by one insertion one time per week for three successive weeks in a supplement to the <i>San Francisco Daily Times</i>, a public newspaper published in the city and county of San Francisco; that said insertions were made and published, one on the 20th day of November, A. D. 1858, one on the 27th day of November, A. D. 1858, and one on the 4th day of December, A. D. 1858. That said publication did designate the time and place of commencing the sale, which time was not less than twenty-one days nor more than twenty-eight days from the first appearance of the publication. That the property assessed, described thus: situated, located, lying and being within the city and county of San Francisco, was, on the day of December, A. D. 1858, in accordance with law, offered at public auction, in front of the said city and county court-house: that at said auction was the bidder who was willing to take the least quantity or smallest portion of said property, and pay the taxes and costs thereon, which taxes and costs, including the \$2 for this certificate, were 100 dollars: that the</p>		



said smallest quantity of the above land was as is hereinafter described                which was stricken off to               , the said                That                paid the full amount of said taxes and costs, and that therefore                became the purchaser of the last described tract or lot of land.

Said real estate was sold subject to redemption, pursuant to the statute in such cases made and provided.

Given under my hand, this                day of December, 1858.

Tax Collector of the City and County of San Francisco.

*Tax Deed—San Francisco.*

No.        Block        . Page        .

NON-PAYMENT OF STATE AND CITY AND COUNTY TAXES, FOR THE FISCAL YEAR 1858-59.

This indenture, made and entered into this                day of                in the year of our Lord [A. D. 18    ] one thousand eight hundred and               , between Jonathan Hunt, tax collector of the city and county of San Francisco, party hereto of the first part, and                of                of the second part.

Witnesseth, that whereas, the tax collector of the city and county of San Francisco, by virtue and in pursuance of an act of the legislature of the state of California, entitled "An Act to provide Revenue for the Support of the Government of this State," approved April 29th, 1857; and "An Act to amend the same," approved April 24th, 1858; and also an act entitled "An Act to provide for the Funding and Payment of the outstanding unfunded Claims against the City of San Francisco and against the County of San Francisco, as they existed prior to the first day of July, A. D. one thousand eight hundred and fifty-six," approved April 20th, 1858, did on the 18th day of October, 1858, levy upon the property of which description is first hereafter given in this deed, for taxes due thereon to the state of California, and to the city and county of San Francisco, together with the costs due upon the same; that the said property was assessed for the fiscal year ending the 30th day of June, 1859, to                and to all owners and claimants known or unknown: that said taxes were levied upon it according to law; that said taxes were not and had not been paid, and at the time of the sale hereinafter spoken of still remained due and unpaid; that publication of the intention to sell for the taxes, including said property for said taxes, was made as provided by law; that said publication was made by one insertion one time per week for three successive weeks in a supplement to the *San Francisco Daily Times*, a public newspaper published in the city and county of San Francisco; that said insertions were made and



the city and county aforesaid, the day and year first above written.

JONATHAN HUNT, [L. s.]

Tax Collector of the City and County of San Francisco.

Witness,

State of California, }  
City and County of San Francisco, } ss:

On this       day of       A. D. (18    ), one thousand eight hundred and       before me,       a notary public in and for said city and county, residing therein, duly commissioned and sworn, personally appeared the within-named Jonathan Hunt, known to me to be the tax collector of said city and county, whose name is subscribed to the annexed instrument, as a party thereto, he being personally known to me to be the individual described in, and who executed the foregoing instrument, and subscribed his name thereto as tax collector, and he duly acknowledged to me that he executed the same freely and voluntarily, and for the uses and purposes therein mentioned.

In testimony whereof, I have hereunto set my hand and affixed my official seal, at my office in the city and county of San Francisco, the day and year last above written.

A. B.

Notary Public.

*Tax Deed for any County.*

State of California, }  
County of       , } ss.

To all to whom these presents shall come, A. B., sheriff [*or*, tax collector] of said county, sends greeting:

Know ye, that in pursuance of, and in conformity with the act entitled "An Act to provide Revenue for the Support of the Government of this State," approved April 20, 1857, and the several acts amendatory thereof and supplementary thereto, as well as the other statutes and laws of the state of California applicable, the real estate hereinafter described was duly assessed for the fiscal year ending June 30, 1859, to X. Y., and to all owners and claimants known or unknown; that state and county taxes, the amount whereof, with costs, is hereinafter specified, were levied upon it, according to law, which taxes, or any part thereof, at the time of levy and sale, as hereinafter mentioned, had not been paid or discharged; that on the third Monday in October, 1858, the sheriff [*or*, collector] of the said county of       , did levy upon the said real estate for the taxes so levied and due thereon, and costs, and at the close of his official business for that day, did enter upon the tax list or assessment roll a statement of the making said levy in due form of law; that publication of the intention to sell said real estate for the taxes and costs due thereon, was made as provided by law; that said publication was made

by one insertion one time per week, for three successive weeks, in the \_\_\_\_\_, a public newspaper published in the \_\_\_\_\_ county of \_\_\_\_\_; that said insertions were made and published, one on the \_\_\_\_\_ day of \_\_\_\_\_, A. D. 18\_\_\_\_, one on the \_\_\_\_\_ day of \_\_\_\_\_, A. D. 18\_\_\_\_, and one on the \_\_\_\_\_ day of \_\_\_\_\_, A. D. 18\_\_\_\_. That said publication did designate the time and place of commencing the sale, which time was not less than twenty-one days nor more than twenty-eight days from the first appearance of the publication; and the place so designated was in front of the county court-house in said \_\_\_\_\_ county; in which said publication, was given the name of the owner of said real estate, so far as the ownership thereof was known, and such a condensed description of said property that the same might easily be known; that the said real estate so as aforesaid assessed, levied upon and advertised, described thus: [*here insert description,*] was by the said sheriff [*or tax collector*], on the \_\_\_\_\_ day of \_\_\_\_\_, A. D. 18\_\_\_\_, in accordance with law, offered at public auction in front of the county court-house in and for the \_\_\_\_\_ county of \_\_\_\_\_; that C. D. was the bidder who was willing to take the least quantity or smallest part of the said land and pay the said taxes and costs, which taxes and costs were \_\_\_\_\_; that the said smallest quantity being the whole thereof, [*or, a less quantity, as the case may be, describing such less quantity*] (no other bidder being willing or offering to take [*the same or*] less and pay such taxes and costs), [*as described*] was at the time and place last aforesaid struck off to him, the said C. D., who then and there paid the full amount of the taxes and costs aforesaid, and therefore became the purchaser of the tract or lot of land hereinbefore described; that the said real estate being subject to redemption, no person has redeemed the same during the time allowed by law for its redemption; and that in all things else respecting the assessment, equalization, levy, advertisement, and sale of the said real estate, the various provisions of the law have been observed and complied with.

Now therefore I, A. B., sheriff [*or, tax collector*] of the county of \_\_\_\_\_, in consideration of the premises, and of the said sum of \_\_\_\_\_ dollars, taxes and costs, by the said C. D. bidden, and paid as aforesaid, the receipt whereof is hereby acknowledged, by virtue of the authority in me vested by the laws of the state of California, do by these presents grant, bargain, sell, convey and confirm unto him, the said C. D., all and singular, the said [*second*] piece, parcel, lot or tract of land hereinbefore mentioned and described, together with all and singular the hereditaments and appurtenances thereunto belonging, and all the estate, right, title, interest, claim, possession, and right of possession, legal, equitable, or otherwise, of the said X. Y., and of all owners or claimants known or unknown.

To have and to hold the same unto the said C. D., heirs and assigns forever, as fully, effectually and absolutely as I, the said A. B., sheriff [or, tax collector] as aforesaid, by virtue of the authority aforesaid, may, can or ought to grant, sell or convey the same.

In witness whereof, I, the said A. B., sheriff [or, tax collector],  
have hereunto set my hand and seal, this                      day of                      ,  
A. D. 18                      .

Executed in presence of \_\_\_\_\_ of the \_\_\_\_\_ A. B., [L. s.]  
county of \_\_\_\_\_

State of California, } ss.  
County of \_\_\_\_\_, }

On this \_\_\_\_\_ of \_\_\_\_\_, A. D. 18\_\_\_\_, before me the undersigned, notary public in and for the said \_\_\_\_\_ county, personally appeared the within-named A. B., personally known to me to be the \_\_\_\_\_ in and for the said \_\_\_\_\_ county of \_\_\_\_\_, and the same individual described in, and whose name is subscribed to, and who executed the foregoing instrument, and acknowledged to me that he executed the same in his said official capacity freely and voluntarily, for the uses and purposes therein mentioned.

In witness whereof, I have hereunto set my hand and affixed  
my seal of office, the day and year hereinbefore mentioned.  
[L. S.] C. D., Notary Public.

*Tax-Deed—by Successor in Office.*

**SAN FRANCISCO—NON-PAYMENT OF STATE AND CITY AND COUNTY TAXES,  
FOR THE FISCAL YEAR 1857-58.**

No.	Block	Page
This indenture, made and entered into this                      day of                      , in the year of our Lord, (A. D. 18                      ) one thousand eight hundred and                      , between Jonathan Hunt, tax collector of the city and county of San Francisco, party hereto of the first part, and                      , of                      , of the second part.		

Witnesseth, that whereas one William Y. Patch, heretofore and at the time of the levy, publication and sale hereinafter spoken of, tax collector of the city and county of San Francisco, by virtue and in pursuance of an act of the legislature of California, entitled "An Act to Provide Revenue for the Support of the Government of this State," approved April 29th, 1857, did, on the 19th day of October, 1857, levy upon the property of which description is hereafter given in this deed, for taxes and costs due thereupon to the state of California, and to the city and county of San Francisco, which said property was assessed for the fiscal year ending the 30th day of June, 1858, to

and to all owners and claimants known or unknown: that said taxes were levied upon it according to law: that said taxes were not, and had not been paid, and at the time of the sale hereinafter spoken of still remained due and unpaid: that publication of the intention to sell for the taxes, including said property for said taxes, was made as provided by law: that said publication was made by one insertion one time per week for three successive weeks in a supplement to the *Daily Times and Town Talk*, a public newspaper published in the city and county of San Francisco; and by one insertion one time per week for three successive weeks in a supplement to the *Daily California Chronicle*, a public newspaper published in the city and county aforesaid: that said insertions were made and published, one in each of the supplements aforesaid on the 16th day of November, A. D. 1857; one in each of said supplements on the 23d day of November, A. D. 1857; and one in each of said supplements on the 30th day of November, A. D. 1857: that said publication was also made by posting three notices on the 16th day of November, A. D. 1857, in the Spanish language, in three conspicuous and public places within each township in the said city and county, to wit: one at the public entrance to the tax collector's office at the city-hall; one at the public entrance to the post-office; one at the public entrance to the United States District and Circuit Court rooms: that said publications did designate the time and place of commencing the sale, which time was not less than twenty-one days, nor more than twenty-eight days, from the first appearance of the publications: that the property assessed, described thus: [description] was, by the said William Y. Patch, tax collector as aforesaid, on the            day of           , A. D. 185   , in accordance with law, offered at public auction, in front of the city and county court-house in said city and county, and            was the bidder who was willing so take the least quantity or smallest portion of the said property, and pay the taxes and costs, including the \$2 for the certificate of sale, which taxes, costs and certificate amounted to            dollars. The said smallest quantity of land, to wit: [description] was by the said William Y. Patch, tax collector as aforesaid, struck off to him, the said           , who paid the full amount of the taxes and costs, and thereupon became the purchaser of the previously described piece or parcel of land, and whereas no person has redeemed the property aforesaid during the time allowed by law for its redemption, and whereas the said Jonathan Hunt has succeeded to the said William Y. Patch, in the said office of tax collector of the city and county of San Francisco, and is now tax collector as aforesaid.

Now this indenture witnesseth, that I, Jonathan Hunt, collector as aforesaid, by virtue and in pursuance of the statute in

such cases made and provided, for and in consideration of the sum of money above mentioned, in hand paid, the receipt of which is hereby acknowledged, have granted, bargained, sold, conveyed and confirmed, and by these presents do grant, bargain, sell, convey and confirm unto \_\_\_\_\_, heirs and assigns, the said property as fully and absolutely as I, Jonathan Hunt, tax collector, as aforesaid, may or can lawfully sell and convey the same, that is to say, all that piece or parcel of land above and last described in this deed. Together with all and singular the tenements, hereditaments and appurtenances thereunto belonging, or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof, as well in law as in equity, of the said \_\_\_\_\_, and of all owners and claimants known or unknown, of, in or to the above-described premises, and every part and parcel thereof, with the appurtenances, or which he or they had or possessed on the day of said levy or assessment.

To have and to hold, all and singular the above-mentioned and described premises, together with the appurtenances, unto the said party of the second part, and \_\_\_\_\_, heirs and assigns forever.

In witness whereof, I have hereunto set my hand and seal, in the city and county aforesaid, the day and year first above written.

JONATHAN HUNT. [L. s.]

Tax Collector of the City and County of San Francisco.

A. B., Witness.

*Declaration and Assignment of Tax Certificate.*

This declaration, made the fifth day of May, 1860, witnesseth, that whereas I, George L. Kenny, became the purchaser at a tax sale held in March last, of a fifty vara lot of ground situated on the south-west corner of Broadway and Front streets, in San Francisco, and received from the tax collector a certificate of such sale, and whereas I was at the same time the lessee from D. P. Belknap, of portions of said lot \_\_\_\_\_, of the lot on Broadway, &c. [*here insert description*]. Now I, the said George L. Kenny, in consideration of the premises, do hereby agree and declare that I purchased said premises at said sale, to the extent of the said two described portions of said fifty vara lot, as trustee of and for the benefit of said lessor, and that upon receiving a deed from said tax collector therefor, I will release and convey to said D. P. Belknap, all the interest in said two lots acquired by me under and by virtue of such sale, and that I will not sell or dispose of, or convey to any other person than said D. P. Belknap, the interest so acquired by me, at such sale, in said two lots of land.

And, in consideration of the premises, I hereby sell, assign, transfer and set over to the said D. P. Belknap, so much of the said certificate of sale as affects the said two lots of land above described, and all my right, title and interest therein and there to, under such sale and certificate.

Witness my hand and seal, the day and year first above-written.

GEO. L. KENNY. [L. S.]

Scaled and delivered in }  
presence of W. NASH.

### *Form of Foreign Miner's License.*

TO BE RENEWED UPON EXPIRATION OF TERM.	No.	No.	County, [date.]	TO BE RENEWED UPON EXPIRATION OF TERM.
	County, [date.] has paid four dollars mining license, which entitles him to work in the mines one month.			
		This certifies that day paid the sheriff of dollars, which entitles him to work in the mines of this state for one month from date. By , Sheriff.	County, [date.] has this county four Controller of State.	

(Every subsequent license after the first, shall be dated from the expiration of the former license issued by the sheriff or his deputy, to any foreign miner, who shall have been engaged in mining from the expiration of such former license.)

### *State and County License.*

No.

#### MONTHLY SALES OR RENTS.

State of California, }  
City and County of San Francisco, } 185 .  
having paid into the city and county treasury  
dollars, license is hereby granted to transact the business  
of for from 185 , to 185 ,  
in conformity with the provisions of an act of the legislature, en-  
titled, "An Act supplementary to, and amendatory of an Act to  
provide Revenue for the Support of the Government of this  
State," passed April 29th, 1857. Approved April 17th, 1858.

Auditor.

Received of the sum of dollars for the above  
license, and also one dollar for the fees of the auditor and treas-  
urer. Treasurer.

By Deputy.

### *State and County License.*

No.

\$11.25. MONTHLY SALES OR RENTS, UNDER \$5,000. NINTH CLASS.

State of California, }  
City and County of San Francisco, } 185 .  
having paid into the city and county treasury eleven  
dollars, license is hereby granted to transact the busi-



ness of                    in                    for three months, from                    185  
to                    185                    , in conformity with the provisions of an act  
of the legislature, entitled "An Act supplementary to, and  
amendatory of an Act to provide Revenue for the Support of the  
Government of this State," passed April 29th, 1857. Approved  
April 17th, 1858.                    Auditor.

Received of                    the sum of eleven  $\frac{1}{2}$  dollars for the above  
license, and also one dollar for the fees of the auditor and treas-  
urer.                    Treasurer.

By                    Deputy.

*State and County License.—Liquors.*

No.

\$15.00.]

MONTHLY SALES UNDER \$5,000.

[THIRD CLASS.

State of California,                    }  
City and County of San Francisco,                    }                    185  
                  having paid into the city and county treasury fifteen  
dollars, license is hereby granted                    to sell spirituous and  
other liquors, in less quantities than one quart, at                    for  
three months, from                    185 to                    185                    , in conformity  
with the provisions of an act of the legislature, entitled "An  
Act supplementary to, and amendatory of an Act to provide  
Revenue for the Support of the Government of this State," passed  
April 20th, 1857. Approved April 17th, 1858.                    Auditor.

Received of                    the sum of fifteen dollars for the above  
license, and also one dollar for the fees of the auditor and treas-  
urer.                    Treasurer.

By                    Deputy.

*Municipal License, for the Quarter ending                    1st, 1859.*

                  City and County Auditor's Office, }  
                  San Francisco,                    day of                    1859. }  
                  , having produced a receipt of the city and county  
treasurer for the sum of                    dollars, license is hereby granted  
to transact the business of                    of the                    class,  
in conformity with the provisions of an order of the  
board of supervisors, "Authorizing and Regulating the issue of  
City and County Licenses." (Approved Sept. 15, 1858.)  
                  City and County Auditor.

This license must be posted up in some conspicuous part of  
your place of business.

*Application for a State License.*

STATEMENT OF                      DOING BUSINESS IN THE CITY AND COUNTY OF SAN  
FRANCISCO, AS A PASSENGER BROKER.

Actual aggregate amount of gross receipts for the  
transportation of passengers on the ocean, from  
2d of                      to 2d of                      , 185                      , -                      - \$  
Less the estimated receipts in previous statement,                      \$

Estimated gross receipts for transportation of passen-  
gers on the ocean, from 2d of                      to                      2d  
of                      , 185                      , -                      -                      -                      -                      -                      - \$

Total                      -                      -                      -                      -                      -                      -                      -                      -                      - \$

San Francisco, Cal.,                      , 185                      .                      A. B.

State of California,                      }  
City and County of San Francisco,                      } ss.

Came before me                      of the state, city and county afore-  
said, who being duly sworn, says that he is                      , and that  
the foregoing statement is true, except as to the estimated  
amount of receipts from and after the 2d of                      , which is  
only a matter of conjecture, and further deponent says not.

Subscribed and sworn before me,                      A. B.  
this                      day of                      , 185                      .

City and County Auditor.

*Passenger Broker's License.*

City and County Treasury, }  
San Francisco                      , 185                      . }

In pursuance of the provisions of "An Act to provide for the  
issuing of Licenses to Passenger Brokers." Approved March  
25, 1857.

, having this day paid into the city and county treas-  
ury of San Francisco, for the use of the general fund of the  
state of California, the sum of                      dollars, being in con-  
formity with the statement of the auditor of the city and county,  
on file in this office, license is hereby granted                      to pursue  
the business of passenger broker in the said city and county, for  
the term of one month from the second day of                      to the  
second day of                      , 185                      .

Treasurer.  
By                      Deputy.

*Order for Passenger Broker's License.*

City and County Auditor's Office, {  
 San Francisco, , 185 . }

Wm. H. Tillinghast, City and County Treasurer:

Upon the receipt of the sum of                  dollars, designated in the statement hereinafter given (the original of which is now on file in my office), you will make out and deliver a license to                  , having an office at                  street, to pursue the business of a passenger broker in the city and county of San Francisco, for one month from the second day of                  185 .

## STATEMENT.

Actual aggregate amount of gross receipts for the transportation of passengers on the ocean, from 2d of                  to 2d of                  185 ,	-	-	-	\$
Less the estimated receipts in previous statement,				\$
				\$
Estimated gross receipts for transportation of passengers on the ocean, from 2d of                  to 2d of                  , 185 ,	-	-	-	\$
Total,	-	-	-	\$
One per cent on the above,	-	-		\$
Fees,	-	-	-	\$2 00
				\$

In accordance with an act of the legislature, approved 25th March, 1858.

City and County Auditor.

## CHAPTER XXXVIII.

## WILLS.

If a person possessed of property die without having made any disposition thereof, the law provides that it shall descend to, and become the property of certain relations, called heirs.

If he wishes to control the matter, however, so that his property shall go to such persons or institutions, and in such proportions as he may desire, he effects that object by making a will.

All wills should be made in writing, although verbal wills can be made, which are called nuncupative wills, which will be more particularly mentioned hereafter.

The principal rules to be observed in making a will, are, that the testator, as he is called, should express clearly and unmistakably, how he wishes his property disposed of, and that he should execute it freely and without restraint, undue influence or fraudulent misrepresentations, when in sound mind, by signing it, and declaring it to be his last will and testament, in the presence of at least two disinterested and competent persons, not mentioned or referred to in the will, and who, at his request and in his presence, and in the presence of each other, shall thereupon subscribe their names as witnesses.

The testator should also mention in the will the person or persons he may wish to be his executor or executors. He should also, when he omits to provide for his children, or the issue of a deceased child, or for children who may be born after making the will, or for any marriage he may enter into after making the will, show that such omission was intentional. And where he desires that his executor or executors should not be required to give security, he should so state in the will.<sup>1</sup>

If the testator cannot write, or from sickness or other cause is

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<sup>1</sup> Wood's Dig. art. 3574, 3578, 3579, 2958.

unable to sign, his name may be signed to the will by some person in his presence, and by his express direction.<sup>1</sup>

If at any time after he has executed his will, he desires to make any alterations in any part of it, or if he desires to make an addition to the will, which is called a codicil, he must sign the same, and have it witnessed in the same manner and with the same formality as is required in executing the original will.

No will in writing shall be revoked, unless by burning, tearing, cancelling or obliterating the same, with the intention of revoking it by the testator, or by some person in his presence, or by his direction, or by some other will or codicil in writing, executed as prescribed by this act, or by some other writing, signed, attested and subscribed in the manner provided by this act, for the execution of a will; but nothing contained in this section shall prevent the revocation implied by law from subsequent changes in the condition or circumstances of the testator.<sup>2</sup>

Any person over the age of eighteen years, of sound mind, may make, alter or revoke a will; but a married woman cannot exercise such right without the consent of the husband, in writing, annexed to such will, alteration or revocation, and attested and subscribed, and to be proven and recorded in like manner as a will is required to be witnessed, proven and recorded, unless the wife has power to make a will, conferred by marriage contract or authority in writing, executed by her husband before marriage.<sup>3</sup>

A will executed by a single woman is deemed revoked upon marriage, and is not subsequently revived by the death of her husband.<sup>4</sup>

No difference is made under the California statute, between wills of real estate and wills of personal estate.

A will should be presented to the Probate Court having jurisdiction, within thirty days after the death of the testator; and after it has been probated, it should be recorded in the office of the county recorder.<sup>5</sup>

No nuncupative will shall be good, when the estate bequeathed exceeds the value of five hundred dollars, nor unless the same be proved by two witnesses who were present at the making thereof,

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<sup>1</sup> Wood's Dig. 8665.

<sup>2</sup> Id. 8673.

<sup>3</sup> Id. 8564.

<sup>4</sup> Id. 8375.

<sup>5</sup> Id. 2294, 2292.

nor unless it be proved that the testator, at the time of pronouncing the same, did bid some one present to bear witness that such was his will, or to that effect, nor unless such nuncupative will was made at the time of the last sickness, and at the dwelling-house of the deceased, or where he or she had been residing for the space of ten days or more, except where such person was taken sick from home, and died before his or her return. Nothing contained herein shall prevent any soldier, being in actual service, nor mariner, being on shipboard, from disposing of his wages and other personal estate by a nuncupative will.<sup>1</sup>

No proof shall be received of any nuncupative will, unless it be offered within six months after speaking the testamentary words, nor unless the words or the substance thereof were reduced to writing, within thirty days after they were spoken.<sup>1</sup>

No probate of any nuncupative will shall be granted for fourteen days after the death of the testator, nor shall any nuncupative will be at any time proved, unless the testamentary words, or the substance thereof, be first committed to writing, and process be issued to call in the widow, or other person or persons interested to contest the probate of such will, if they think proper.<sup>1</sup>

When any estate shall be devised to any child, or other relation of the testator, and the devisee shall die before the testator, leaving lineal descendants, such descendants shall take the estate so given by the will, in the same manner as the devisee would have done, if he would have survived the testator.<sup>2</sup>

Every devise of land in any will shall be construed to convey all the estate of the devisor therein, which he could lawfully devise, unless it shall clearly appear by the will that he intended to convey a less estate.<sup>3</sup>

Any estate, right or interest in lands acquired by the testator, after the making of his or her will, shall pass thereby, in like manner as if it passed at the time of making the will, if such shall manifestly appear by the will to have been the intention of the testator.<sup>3</sup>

No will made in any other of the United States, or in any foreign country or state, shall be deemed valid as a will in this state, unless executed according to the provisions of this act.<sup>3</sup>

<sup>1</sup> Wood's Dig. art. 3549-3571.

<sup>2</sup> Id. 3553-3555.

## JUDICIAL DECISIONS.

The several statutes of this state relating to wills, do not apply to wills executed previous to their passage. There is no provision for the probate of such wills, and they must rest for their validity upon the laws under which they were made.<sup>1</sup>

A will is regarded as a conveyance, and takes effect as a deed, on proof of its execution, unless there be some express statute requiring it to be probated.<sup>2</sup>

The homestead cannot be disposed of by will, neither can the testator dispose of more than one-half of the community property, the other half being the property of the survivor.<sup>3</sup>

## OREGON AND WASHINGTON.

The foregoing provisions apply to wills in *Oregon* and *Washington*, except in the following matters of difference:

A will of real estate can only be made by a person twenty-one years of age and upward, and in every case, the dower right is reserved to the widow.<sup>4</sup>

A will of personal estate, may be made by a person over eighteen years of age.<sup>5</sup>

A married woman, may by will dispose of any real estate held in her own right, subject to her husband's right as tenant by courtesy.<sup>6</sup>

In all cases where lands devised by will are situated in different counties, a copy of such will shall be recorded in the recorder's office in each county, within six months after the probate.<sup>7</sup>

## FORMS.

*Simple Form of Will.*

I, A. B., of lawful age, at present a resident of \_\_\_\_\_, do publish and declare this my last will and testament:

1st. I give and bequeath to C. D. [*here mention the amount of money, the goods or other property*].

2d. I devise to E. F. [*here mention or describe the land devised*].

<sup>1</sup> 10 Cal. 465.

<sup>2</sup> 6 id. 168.

<sup>3</sup> 10 id. 507; 5 id. 252.

<sup>4</sup> Statutes O. 384; Statutes W. 312.

<sup>5</sup> Statutes O. 387; Statutes W. 314.

3d. I give, devise and bequeath to R. B., my wife [*the homestead and household furniture or other property*].

4th. I direct my executors to sell my real estate or any portion thereof, whenever it becomes necessary or expedient.

5th. I declare that I am out of debt [*or, that the following list contains a statement of all my present indebtedness, other than the debts of the commercial house of which I am a member*].

6th. The remainder of my property I leave to descend according to the law of distribution, provided any member of my family or any of my descendants be living at the time of my death. If none of them be living, then one-fourth of such residue is to go to O. P., one-fourth to Q. R., one-fourth to the Orphan Asylum, and one-fourth to the

Society.

Lastly. I appoint R. B., my wife, as my executrix, and S. T. and U. V. my executors, either or all of them, to serve as they may wish, without the necessity of giving bonds. A. B.

San Francisco, June 14th, 1859.

Signed by the testator, and by him published and declared to be his last will and testament, this 14th day of June, 1859, in the presence of us and each of us, who at his request and in his presence, have hereto subscribed our names as witnesses.

W. X.

Y. Z.

### *Form of Will.*

In the name of God, amen. I, Thomas Hill, of the city of San Francisco, state of California, being of sound mind and memory, do make, publish and declare, this my last will and testament, in manner following, that is to say,

1st. I give and bequeath to my brother, John Hill, of the city of New York, merchant, all my personal estate, goods and chattels, of every kind, including all my share, right, title and interest of, in and to the copartnership of T. Hill & Co., the stock thereof, its business, good will, choses in action, property and interest of property of whatever kind, in trust, that he will convert the same into money, either at public or private sale, upon such terms as to him shall seem meet, and the proceeds shall invest in bonds sufficiently secured by mortgages upon unincumbered real estate, in the state of California or elsewhere, drawing interest, and the net income thereof he shall pay or cause to be paid, to my mother, Mary Hill, now, or late a resident of Liverpool, England, in quarter-yearly payments, during the term of her natural life; and from and after her death, I give and bequeath the same, absolutely, to my said brother John Hill.

2d. I give and devise all my real estate of every name and



nature, and wherever situated, to my said brother John Hill, in trust, that he will pay the net rents and profits thereof to my said mother during the term of her natural life, in regular quarter-yearly payments.

3d. I commend to the care and affection of my said brother John Hill, all his and my brothers and sisters, who shall survive our said mother at her death.

4th. I nominate and appoint, as the executors of this my last will and testament, William Tripp, of the the city of San Francisco, merchant, John Hill (my said brother), and Edward Cass, of the city of San Francisco, banker; and I give to any two of them, in the absence or inability to act of the other, full powers to act in every respect. And further, in case it shall seem expedient to the said William Tripp and Edward Cass, as my executors, in the absence from the city of San Francisco, of my said brother John Hill, they are hereby empowered to convert the personal property and estate, in article 1st of this will mentioned, into money, in the manner and upon the terms in said article mentioned; and to deposit the same, after paying all just and valid debts, claims and expenses, with some banking-house in San Francisco in good repute, as a special deposit for account and order of said John Hill.

And it is my desire that the fact of said William Tripp being herein mentioned and nominated as one of my executors, and his acting as such after my death, shall not prevent or disqualify him from purchasing, alone or with others, any of the personal estate and property in said article first mentioned, if the same shall seem meet and proper to my other two said executors, who may thereupon do all acts, and execute all agreements necessary in the premises.

In witness whereof, I, the said Thomas Hill, the testator, have hereunto set my hand and seal this twentieth day of March, in the year of our Lord one thousand eight hundred and fifty-six.

THOMAS HILL. [L. s.]

Signed, sealed, published and declared by the said Thomas Hill, the testator, as and for his last will and testament, in the presence of us, who in his presence, at his request, and in the presence of each other, have hereunto subscribed our names as witnesses.

JOHN GRAYHAM.  
GEORGE RYAN

### *Short Form.*

I, Warren C. Norris, of the city of San Francisco, being dangerously ill, but sound in mind, do by these presents make this my last will and testament, and give and bequeath all my estate, real and personal, of which I may die seized and possessed, after

paying my funeral expenses and just debts, to my brother, James Norris, and hereby appoint James Graves, of San Francisco, executor of this my last will and testament.

In testimony whereof, I have hereunto subscribed my name and affixed my seal this twenty-fifth day of January, 1852.

his  
WARREN C. X NORRIS. [L. s.]  
mark.

On this 25th day of January, 1852, the foregoing will was read to the said Warren C. Norris, and executed by him in the presence of us and each other, and declared by said Norris to be his last will and testament, and we subscribed our names as witnesses thereto at his request, in the presence of said Norris and each other.

R. N. MORRISON.  
C. V. STEWART.  
L. TAKFFS.

#### *Another Form.*

In the name of God, amen. I, John Jackson Starkey, of the city of San Francisco and state of California, being weak in body, but of a sound and disposing mind, do make, publish and declare this my last will and testament, in manner following, that is to say—

1st. I give, devise and bequeath to my executors, hereinafter named, all and singular, my property, real and personal, wheresoever situated, and all moneys belonging to me of which I may die possessed, in trust, nevertheless, and to and for the following uses and purposes, viz. :

2d. I direct my said executors to sell, all and singular, the estate and property belonging to me which may come into their hands, as soon after my death as, in their judgment, may be most for the interest of my estate, and convert the same into cash; and I direct my said executors to invest such proceeds of sale, with all moneys that may come into their hands, and keep the same invested in some safe manner, as in their judgment may seem best, for the benefit of my two daughters, Catharine and Elizabeth Starkey, equally.

3d. I appoint my executor, William Beamonte, Esq., hereinafter named, the guardian of the persons and estate of my said daughters, and request him to undertake the management and control of such moneys belonging to me as may come into his hands, in England, and to invest the same as hereinafter directed, and to apply the income thereof to the support and education of my said daughters, so long as they remain unmarried; and if either of my daughters shall marry, then I request my said exec-

utor, Beamonte, to settle upon the one so marrying, the portion of such moneys or property belonging to her, in such manner that the same shall be free from all control of her husband, and that she may realize and enjoy the income thereof, without any interference or hindrance on the part of such husband.

4th. I request my executor, Lewis A. Thomas, hereinafter named, to exercise his discretion with the moneys belonging to me which may come into his hands in California, whether to invest the same in some safe manner, for the benefit of my children as aforesaid, or to remit the same, by some safe method, to my said executor Beamonte, in England. But whenever, in the judgment of my said executor Thomas, it may be expedient, I will and request that he remit to my said executor Beamonte, such moneys, principal and interest, as may come into his hands, to be used and employed by him for my said children, in the manner above provided.

5th. I hereby nominate and appoint my friends, the said William Beamonte, Esq., Warrington, Lancashire, county of Lancashire, England, to be my sole executor in England of this, my last will and testament, and guardian of the persons and estate of my said daughters, as aforesaid. And I nominate and appoint my friend, the said Lewis H. Thomas, to be my sole executor in California—directing that each of my said executors be accountable only for the moneys or property that each may receive, and not one for the other.

6th. In the event of the death of either of my said daughters, then I leave the portion of my said estate to which she would be entitled, to her issue lawfully begotten; or if she should die without lawful issue, then I direct that such portion be held by my executor Beamonte, for the benefit of the daughter that may survive upon the same trusts and conditions as hereinabove expressed.

7th. I hereby revoke and annul all other and former wills by me made.

In witness whereof, I hereunto put my hand and affix my seal at the city of San Francisco, this twentieth day of January, in the year of our Lord one thousand eight hundred and fifty-two.

JOHN J. STARKEY.

Subscribed by the testator, John J. Starkey, in the presence of each of the undersigned. The said testator at the time of subscribing to said will, declared the same to be his last will and testament, and we in his presence and in the presence of each other, and at the request of said testator, have subscribed our names as witnesses.

HORACE P. JAMES, San Francisco,  
JAMES THOMAS BOYEL, San Francisco.

*Will.*

In the name of God, amen. I, \_\_\_\_\_ of the city of \_\_\_\_\_ and county of \_\_\_\_\_, state of \_\_\_\_\_ in the United States of America; merchant, being of sound mind and memory, do make publish and declare, this my last will and testament, that is to say :

1st. I make, constitute and appoint \_\_\_\_\_ of \_\_\_\_\_ and \_\_\_\_\_ of \_\_\_\_\_, and (except as in this article hereinafter provided) the survivors and survivor of them, the executors of this my last will and testament, to act without giving any bond, undertaking, or security of any kind; with the right in either of the said \_\_\_\_\_, in case of his inability to act by reason of absence from said city of \_\_\_\_\_ or otherwise, to act by an approved agent or attorney-in-fact, appointed by him in writing under his hand (such agent or attorney, while so acting to have all the powers of him by whom he shall have been so appointed). Until the arrival in said city of \_\_\_\_\_ of \_\_\_\_\_, or of one of them, and of the agent or attorney-in-fact, of the other, the said \_\_\_\_\_ shall have full powers to act in the preservation and management of my estate. In case of the inability to act of the said \_\_\_\_\_ by reason of absence, sickness, death or otherwise, I make, constitute and appoint, as executor in his stead \_\_\_\_\_, of the said city of \_\_\_\_\_.

2d. I desire and direct that my copartners in business, who are the said \_\_\_\_\_, and who with myself are now a copartnership, transacting business in Paris and San Francisco, under the firm name of \_\_\_\_\_, shall, immediately after my death, or as soon thereafter as may be practicable, take the necessary measures to ascertain the just amount and value of my share and interest in the said partnership, its stock, assets and property of every kind, real and personal, including the cash on hand, if any, and they shall prepare in writing a full account and statement thereof; at which amount and value, or as near thereto as possible, they may dispose of the same either at public or private sale, and for cash or on credit, as they may think fit; or they may themselves become the purchasers, in which case they shall be entitled to credit, in the payment, of three years, commencing from and after the day of my death; and until the expiration of said period of three years, they shall not be liable to account for or pay over the same or any part thereof, whether upon the order, judgment or decree of any court, or judge, or otherwise, to my heirs, legatees or personal representatives or any of them.

This article shall apply fully to my surviving partner, if at my death there shall be but one me surviving.

3d. I declare that all property, real and personal, including all houses, lands and household interests, standing in my name, in

this state or elsewhere, does of right and in fact belong to the said partnership of                      and is partnership property, and no part or portion thereof belongs to me as my separate property.

4th. I give and bequeath to                      during her natural life, the interest on the sum of \$                      , which sum may remain in the hands of the said                      and of the survivor of them so long during the life of                      as they yearly or quarter-yearly, or he shall pay, for the use thereof, at least the same interest as shall be paid upon moneys by the Bank of France, or any other equally solvent banking institution. But they or he failing to do so, my executors shall invest said sum of \$                      securely at interest, payable to                      yearly or quarter-yearly, at her will. I give to                      , wife of                      of the city of Paris, in France, the sum of \$                     

I give to                      , daughter of said                      \$                      , payable to her said father and mother, and for which their receipt shall be a sufficient acquittance, in the hope and expectation on my part that they will invest the same at interest for her until she has attained her lawful majority.

I give to                      \$                      each.

I give to                      of San Francisco, daughter of                      France, \$                     

I give to                      as the cashier or trustee (or whosoever said cashier or trustee may be), of the association known as the                      and organized in our family in the year                      , and in trust for the said association, and the uses and purposes thereof, \$                     

All the rest, residue and remainder I give to                      and the survivors and survivor of them. After the death of                      , give to them or to such of them as may survive her, the said principal sum of \$                      hereinbefore charged with the payment of the interest thereof, as an annuity to her during her life.

In case of the death of the above legatees, or devisees, or any of them during my life, then the sum or sums of money above bequeathed to them, or him, or her respectively, I give and bequeath to                      and to the survivors or survivor of them, to be disposed of as they shall see fit. In case of the death of                      during my life, I give and bequeath in the same manner the said sum of \$                      above charged with an annuity to her.

5th. In the event of my estate not being sufficient to pay all the above and specified sums of money in full, then each and all of the same shall be proportionately reduced.

6th. I hereby revoke all former wills by me made.

[Signed and witnessed as in foregoing forms.]

*Will.*

In the name of God, amen.

This is the last will and testament of Isaac Lamm, merchant, now residing in the city of San Francisco.

Being afflicted by sickness, in full possession of my mind and memory, and knowing the uncertainty of this life, and desirous to dispose of my worldly affairs, I ordain this my last will, as follows:

1. I give and bequeath all my real and personal property, be the same in money, gold, silver, wares and merchandise, and especially my interest in the store of Isaac Lamm and Co., or anywhere else, to my beloved wife Helen, for her sole use and benefit forever.

2. Whereas I have made and accumulated all, or nearly all, my present property, by and with the assistance of my present wife before mentioned, I herewith distinctly declare that I do not give or bequeath any thing to the children of my former marriage, but bequeath all my property, both real and personal, to my wife Helen, to the exclusion of every one else otherwise entitled to the same.

3. I appoint my beloved wife Helen, the sole executrix of this my last will and testament.

4. I hereby revoke all wills heretofore made, and especially one made years ago, in France.

In witness whereof, I have hereunto set my name and affixed my seal, this ninth day of October, 1856, at the city of San Francisco, California. (Signed) I. LAMM. [L. S.]

The above written instrument was subscribed by the said Isaac Lamm, in our presence, and acknowledged by him to each of us, and he at the same time published and declared the above instrument, so subscribed, to be his last will and testament, and we, at the testator's request, in his presence and in each other's presence, have signed our names as witnesses thereto, together with our places of residence.

WM. RABE, 163 Clay street.

WM. MEYER, 174 Clay street.

LERY SIMON, Dupont street.

*Short Form.*

I, John Smith, make this, my last will.

1st. I give my watch, and my interest in the law library and office furniture of Smith & Brown, to James Brown.

2d. I give all my other property of every kind, in the state of California, to my sister, Mary Smith, and declare that this will is not to interfere, in any way, with the will I made before I left

Georgia, it being my intention that said will shall continue, as to every thing out of California.

3d. I appoint James Smith and Henry Smith my executors, and no security is to be required of them, as I have full confidence in them.

Witness my hand and seal, this 19th day of May, 1857.

JOHN SMITH. [L. s.]

Signed by the testator, John Smith, in our presence, and by his request, and by his express direction, attested by us, subscribing our names hereto, in presence of the testator and of each other, at San Francisco.

JAMES SIDNEY.

FRANK HORTON.

### *Will.*

In the name of God, amen. I, Joseph L. Folsom, United States army, residing in the city of San Francisco, state of California, being of sound mind and memory, and considering the uncertainty of life, do therefore make, ordain, publish and declare this to be my last will and testament. That is to say :

1st. After all my lawful debts, whether to government or to individuals, are paid and discharged, I give, bequeath and devise to my mother, Mrs. \_\_\_\_\_, now living at Meredith Bridge, state of New Hampshire, the sum of five thousand dollars, during her lifetime; what remains of the same at her death, to go to her grandchildren by my sister, Mrs. \_\_\_\_\_, who now lives at Northfield, state of New Hampshire.

2d. I give, bequeath and devise all my personal effects and property in equal portions, to my said mother and my said sister \_\_\_\_\_, and I request that such of my personal effects as in the opinion of my executors may be worthy of preservation, and easy of shipment, may be sent to them *via* Boston.

3d. I give, bequeath and devise all my real estate which remains after satisfying the foregoing provisions, as follows: two-thirds of the same to the children of the said \_\_\_\_\_, my sister—the male child to have one-third of the two-thirds so bequeathed—and the remaining one-third of my said real estate I give, bequeath and devise to my nephew, \_\_\_\_\_, now living at Bedford, in the state of Ohio, at school.

4th. I make and appoint my friends H. W. Halleck, A. C. Peachy and P. Warren Van Winkle, all now in the city of San Francisco aforesaid, executors of this my last will and testament, hereby revoking all former wills by me made.

J. L. FOLSOM. [L. s.]

The above-written instrument was subscribed by the said Joseph L. Folsom in our presence, and acknowledged by him to

each of us, and he at the same time published and declared the same so subscribed to be his last will and testament; and we, at the testator's request, and in his presence, and in the presence of each other, have signed our names as witnesses thereto.

FREDERICK BILLINGS.

JAMES R. BOLTON.

D. B. NORTROP.



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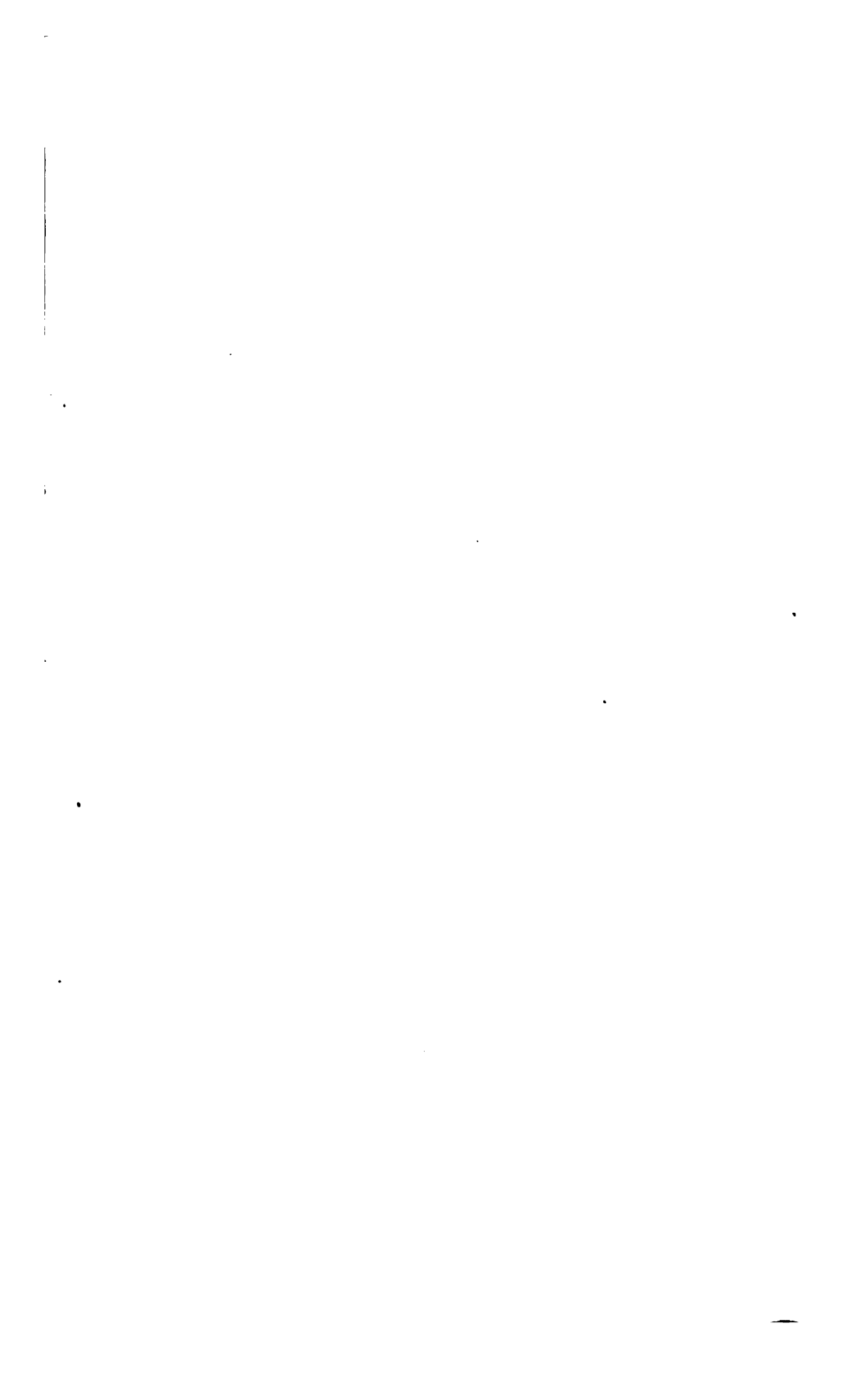
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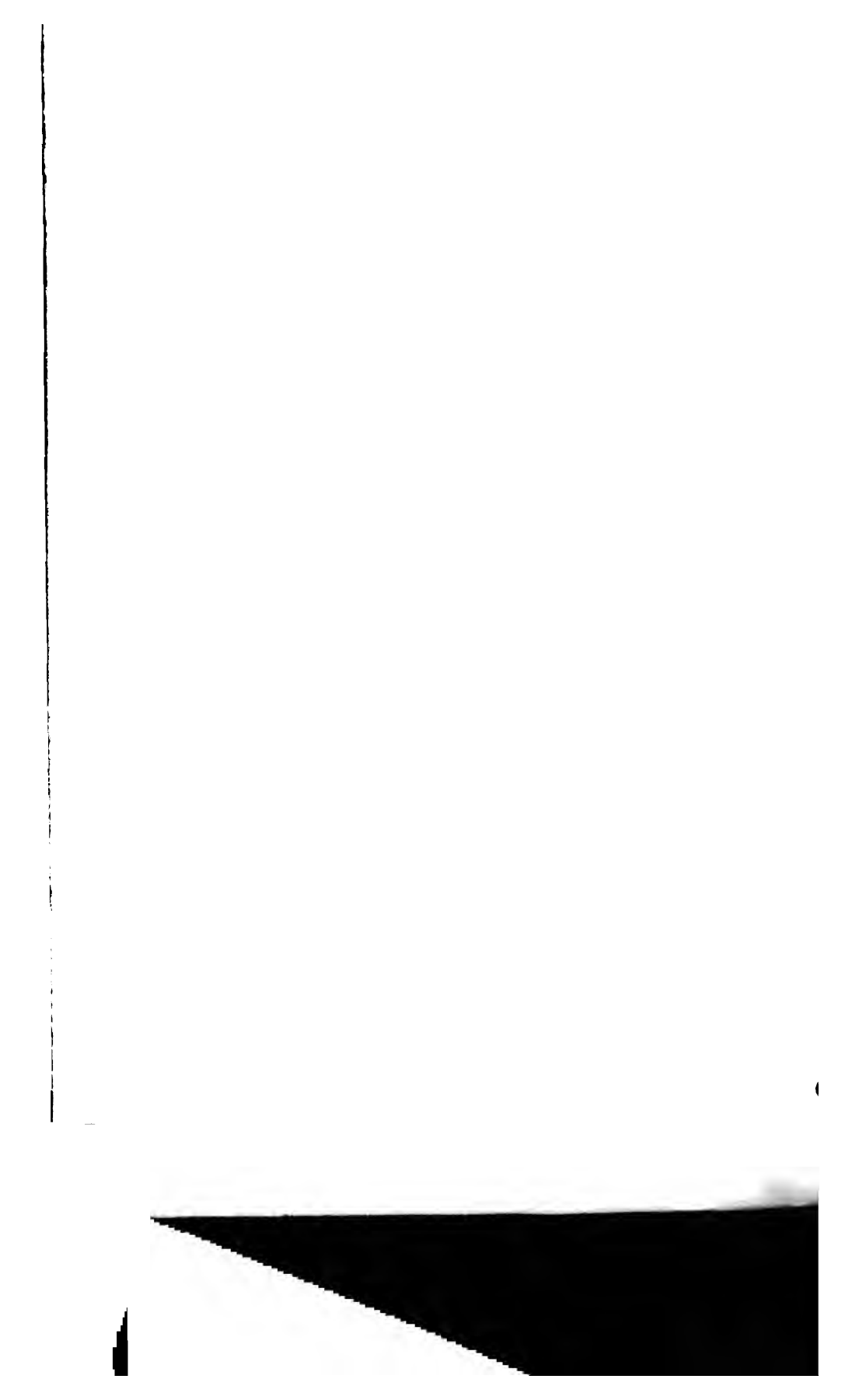
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